



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUL 1 8 2011

REPLY TO THE ATTENTION OF:

Cathy Stepp, Secretary
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Ms. Stepp:

I am writing with regard to the legal authority under which Wisconsin administers its National Pollutant Discharge Elimination System (NPDES) approved program. The U.S. Environmental Protection Agency has completed a review to determine if the State has the minimum legal authority needed to properly administer the program. In general, the provisions in 40 C.F.R. §§ 123.25, 123.27, and 123.30 formed the basis for the review. EPA promulgated these provisions under section 304(i) of the Clean Water Act, 33 U.S.C. § 1314(i). We conducted the review as part of EPA's Permitting for Environmental Results (PER) initiative, a national partnership with states to strengthen the NPDES program. Under PER, EPA reviews the integrity of state NPDES programs and works together with states to make improvements as needed.

EPA approved Wisconsin's NPDES base program in 1974. EPA subsequently approved the State to regulate discharges from federal facilities, administer the pretreatment program, issue general permits, and implement the biosolids program.

During the review of Wisconsin's legal authorities, EPA coordinated closely with your staff to understand the State's authority and identify and resolve questions. We thank you and your staff for the time and effort spent during this lengthy process, which included six meetings or calls with the State beginning September 2009.

The enclosure to this letter identifies concerns with or questions about the State's authority. Omissions or deviations from federal requirements are specifically identified. As noted in the enclosure, certain of the concerns remain the subject of prior disapprovals by EPA under 40 C.F.R. § 123.62. These require immediate corrective action by the State.

Recently, the Wisconsin Supreme Court issued an opinion in *Andersen v. Department of Natural Resources*, 332 Wis. 2d 41, 796 N.W. 2d 1 (2011), which, among other things, stated:

When the EPA approved the WPDES permit program, the EPA deemed Wisconsin's statutory and regulatory authority adequate to issue permits that comply with the requirements of the Clean Water Act and of 40 C.F.R. pt. 123. See 33 U.S.C. § 1342(b)(1)(A), (2)(A); § 1342(c)(1); 40 C.F.R. § 123.61(b). 40 C.F.R.

§ 123.25 sets forth the permitting requirements that a proposed permit program must meet. Significantly, both 40 C.F.R. §§ 122.44 and 122.45 are included among those permitting requirements. See 40 C.F.R. § 123.25(a)(15), (16). Thus, when the EPA approved the WPDES permit program, the EPA necessarily determined that the program complies with 40 C.F.R. §§ 122.44 and 122.45. Similarly, any substantial revisions to the WPDES permit program have been, and will continue to be, subject to the EPA's approval. See 40 C.F.R. § 123.62(a).

Id. at 72-3, 796 N.W. 2d at 17. Our comments in the enclosure indicate numerous apparent omissions and deviations between Wisconsin's current statute and regulations and federal requirements. In light of the *Andersen* case, we are requesting that the omissions and deviations in State authority be corrected quickly. Further, we emphasize that EPA has not approved those elements of the State's program that are less stringent or comprehensive than federally required.

Please provide a written response to this letter. With the reply, please provide a detailed statement from the Wisconsin Attorney General, with specific citations, demonstrating that the State has adequate authority on the topics identified in the enclosure. If the State lacks explicit authority, please provide the State's plan, including a schedule with milestones, for establishing the required authority. Please ensure that required administrative rules will be promulgated not later than one year after the reply letter, and that required statutory provisions are promulgated within no more than two years. Please provide the reply letter and any Attorney General's statement by October 15, 2011.

Again, thank you for cooperating with EPA to review Wisconsin's NPDES authority. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Hedman', with a long horizontal flourish extending to the right.

Susan Hedman
Regional Administrator

Enclosure

Enclosure¹

1. The federal rule at 40 C.F.R. § 122.41(m) pertains to intentional diversions around a portion of a treatment facility. Wisconsin amended its analog in January 2011. The analog now appears at Wis. Admin. Code NR §§ 205.07(1)(v) and (2)(d). The Wisconsin rule appears inconsistent with the federal rule for the following reasons. First, the state regulation includes overflows from collection systems. The federal provision at 40 C.F.R. § 122.41(m)(1) limits bypass to mean the intentional diversion around any *portion of a treatment facility* (emphasis added). Second, the Wisconsin rule allows the State to authorize scheduled bypasses whereas the federal rule provides that a permittee may allow a bypass only if it is for essential maintenance and the bypass does not cause effluent limits to be exceeded. Third, the federal regulation provides that the Director may approve an anticipated bypass if the Director determines that the conditions in 40 C.F.R. §§ 122.41(m)(4)(A) - (C) are met. The state regulation does not appear to include these as necessary conditions for authorizing scheduled bypasses. Fourth, some of the reporting requirements under the state regulation appear less rigorous than those in 40 C.F.R. § 122.41(m). The federal regulation requires oral reporting of bypass within 24 hours; the state regulation allows for fax or e-mail reporting. The federal regulation requires written reporting within 5 days of the time the permittee becomes aware of the bypass; the state regulation requires reporting within 5 days of the *cessation* of the bypass. The federal regulation requires reporting of the date and time of bypass; the state regulation requires only that the date be reported. Wisconsin must modify the State rule to be consistent with federal requirements, or document the specific basis of the State's authority to implement the provisions above consistent with federal program requirements and in a manner that addresses the concerns raised above.

2. The federal rule at 40 C.F.R. § 122.45 addresses a variety of topics, such as the duration over which effluent limitations are to be expressed, pollutants in intake water, internal waste streams, and mass limitations. EPA did not find Wisconsin statutory or code provisions that implement 40 C.F.R. § 122.45. The State needs to promulgate rules to include a provision equivalent to 40 C.F.R. § 122.45, or document the specific basis on which the State has the necessary authority to implement the federal regulatory provision as described.

3. The federal rule at 40 C.F.R. §§ 124.5 (a), (c) and (d) provides a process for the modification, revocation and reissuance, or termination of permits. § 124.5(a) allows "interested persons" to request these actions in writing; § 124.5(c) provides a process for issuance of a modified permit; and § 124.5(d) provides a process for permit termination. Wisconsin's provisions at Wis. Stat. §§ 283.53(2) and 283.63, and in Wis. Admin. Code NR § 203, do not allow an "interested person" to request modification, revocation and reissuance, or termination of permits, and therefore the State's rules appear to functionally restrict the class of individuals that may seek review of a permit. Additionally, Wisconsin's regulations do not appear to provide a mechanism for the termination of a permit (further discussed below). The State must modify its statute

¹ EPA's legal authority review considered Wisconsin's governing statute and rules generally as they existed in 2005. Subsequent changes to Wisconsin's NPDES legal authorities need to be submitted to EPA for possible program revision and approval under 40 C.F.R. § 123.62. Changes that have not been submitted to and approved by EPA are not part of the state's federally approved NPDES program and cannot supersede or revise the previously approved provisions without specific EPA approval.

and/or rule to include a provision equivalent to 40 C.F.R. § 124.5, or document the specific basis on which the State has the necessary authority to implement the regulatory provision as described.

4. 40 C.F.R. part 125, Subpart I, includes requirements for cooling water intake structures at new facilities, under § 316(b) of the Clean Water Act (CWA), 33 U.S.C. § 1326(b). While Wis. Stat. § 283.31 provides authority for Wisconsin to require that the location, design, construction and capacity of water intake structures reflect the best technology available for minimizing adverse environmental impacts, EPA did not find code provisions prescribing the manner in which Wisconsin will carry out its statutory authority relative to new facilities. The State must modify its rules to include a provision equivalent to 40 C.F.R. part 125, Subpart I, and the related provisions of the CWA, or document the specific basis on which the State has the necessary authority to implement the regulatory provision as described.

5. The federal rule at 40 C.F.R. § 123.30 provides that all states shall provide an opportunity for judicial review in state court of the final approval or denial of permits, without limitations based on financial interest or proximate property ownership. Wisconsin's requirement at Wis. Stat. § 227.52 that an administrative decision "adversely affect the substantial interests of any person," does not define "adversely affect" and "substantial interests." It appears that § 227.52 restricts the class of persons entitled to seek judicial review as set out in 40 C.F.R. § 123.30 and CWA § 509, 33 U.S.C. § 1369. The State must document how its provisions for judicial review provide as expansive an opportunity for judicial review as do the federal requirements, or modify its statute and/or promulgate a rule to be consistent with federal requirements.

6. Wisconsin law at Wis. Stat. § 283.17(2) provides a 10-year period of protection from the requirement to meet more stringent effluent limitations when modifications have been made to a facility to meet thermal effluent limits established on the basis of water quality standards or Wis. Stat. § 283.17(1). This provision is similar to CWA § 316(c), 33 U.S.C. § 1326(c). However, the Wisconsin provision appears broader in scope than the federal equivalent in that it includes in this exemption facilities with alternate thermal limitations (established under Wis. Stat. § 283.17(1)), not just facilities with water quality-based effluent limitations (WQBELs).

The basis for a period of protection in the Clean Water Act is a modification to a facility to meet thermal limitations. A facility to which an alternative thermal limit has been granted generally is not similarly situated to a facility which has made modifications to meet thermal effluent limits established on the basis of water quality standards. Alternative thermal limitations are premised on a demonstration that the current discharge is protective of the balanced and indigenous population (BIP) of shellfish, fish, and wildlife. See CWA § 316(a), 33 U.S.C. § 1326(a), and 40 C.F.R. part 125, Subpart H. Pursuant to this statutory provision, alternate thermal limitations require ongoing assessment, including data collection, to be able to demonstrate that a BIP is being protected. If studies indicate that a BIP is not being protected, then modifications to the facility may be required to meet protective limitations. Thus, the period of protection in CWA § 316(c) is not applicable to facilities with alternative thermal limitations. Under Wis. Stat. § 283.17(2), however, a facility with such alternative thermal limitations could claim an entitlement to a period of protection. The State must amend Wis. Stat. § 283.17(2) to eliminate

coverage of dischargers with alternate thermal limitations, or explain the basis on which the State will limit the period of protection consistent with the scope of the federal provision as described.

7. Wis. Stat § 283.19 requires the Wisconsin Department of Natural Resources (WDNR) to establish New Source Performance Standards (NSPS) by rule. EPA's review found that Wisconsin has not consistently updated Wis. Admin. Code NR §§ 221 through 299 to incorporate new or revised federal NSPS. Accordingly, please explain:

(a) Under what authority does Wisconsin incorporate federal NSPS into permits where Wisconsin omits a federal NSPS from Wis. Admin. Code NR §§ 221 through 299?

(b) Under what authority does Wisconsin incorporate the federal NSPS into permits where a NSPS in Wis. Admin. Code NR §§ 221 through 229 is less stringent than the federal NSPS?

Additionally, EPA reviewed Wis. Stat. § 283.31(3)(d) 2 and Wis. Admin. Code NR § 220.13. These provisions appear to authorize the establishment of effluent limitations based on federal effluent limitations guidelines (ELG) even when Wisconsin omits a federal ELG from Wis. Admin. Code NR §§ 221 to 299, or includes in those chapters an ELG that is less stringent than the federal counterpart.

(c) To the extent that Wisconsin cites to Wis. Stat. § 283.31(3)(d) 2 and Wis. Admin. Code NR § 220.13 in answering either question (7)(a) or 7(b) above, please explain how the provision operates for NSPS in light of the specificity provided in Wis. Admin. Code NR §§ 221 to 299. For issues 7 (a) – (c), if Wisconsin does not have authority to implement federal NSPS and ELG into permits, then the response to this letter must include the State's plan, with a schedule and milestones, for establishing the necessary authority.

8. The Wisconsin rule at Wis. Admin. Code NR §§ 106.145 pertains to the establishment of WQBELs for mercury discharges. By letter of February 17, 2009, EPA disapproved certain aspects of this rule. Wisconsin must amend the rule to cure the disapproval.

9. The Wisconsin rules at Wis. Admin. Code NR § 219 pertain to analytical methods.

(a) Wis. Admin. Code NR § 219 allows use of solid waste methods in the WPDES and Wisconsin pretreatment programs. EPA has not approved solid waste methods for use in the NPDES or federal pretreatment programs. Wisconsin must amend Wis. Admin. Code NR § 219 to exclude solid waste methods from use in the Wisconsin programs, except when such methods have been approved by EPA as alternative test procedures under 40 C.F.R. § 136.5.

(b) Wis. Admin. Code NR § 219 incorporates some of the methods that EPA has promulgated under 40 C.F.R. part 136. Does the chapter incorporate an EPA method only as of the date Wisconsin incorporated each such method into the chapter or are revisions to EPA methods prospectively incorporated?

(c) Has Wisconsin amended the chapter to include new EPA methods? Please see the attached list of changes to 40 C.F.R. part 136 since 2000.

The response to this letter needs to include the State's plan, with a schedule and milestone, for correcting Wis. Admin. Code NR § 219 to address the deficiency in number 9 (a) and any deficiency identified through the State's analysis of 9(b) and (c) above.

10. The federal rule at 40 C.F.R. § 132.6 identifies provisions of 40 C.F.R. part 132, Appendix F, which apply to the Great Lakes States, including Wisconsin. These specifically include: Procedure 3 (pertaining to total maximum daily loads (TMDL), wasteload allocations (WLA) in the absence of a TMDL, and preliminary WLAs for purposes of determining the need for WQBELs); Procedure 5, paragraphs D and E (pertaining to consideration of intake pollutants in determining “reasonable potential” and establishing WQBELs); and Procedure 6, paragraph D (pertaining to whole effluent toxicity). In 2000, EPA disapproved the corresponding Wisconsin rules and promulgated 40 C.F.R. § 132.6 for Wisconsin (see 65 *Federal Register* 66511 (November 6, 2000)). Wisconsin must amend the State rules as required to cure the disapproval.

11. The federal rule at 40 C.F.R. § 122.44(d) pertains to the establishment of effluent limitations based on water quality standards, including water quality criteria expressed in either a numeric or narrative fashion. Except for the general statement in Wis. Stat. § 283.31(5) (providing that the Department shall establish more stringent limitations if necessary to meet water quality standards), and the specific provisions in Wis. Admin. Code NR § 106 (pertaining to toxic and organoleptic substances) and Wis. Admin. Code NR § 217, Subchapter III (2010) (pertaining to phosphorus), EPA did not find equivalent State provisions that implement 40 C.F.R. § 122.44(d). The response to this letter must include the State’s plan, with a schedule and milestones, to establish rules (in addition to those in NR 106 and 217) that conform to 40 C.F.R. § 122.44(d).

12. Federal regulations prohibit permit issuance when permit conditions do not ensure compliance with the applicable water quality requirements of all affected states. 40 C.F.R. § 122.4(d). Wisconsin appears to lack an equivalent provision. We note that Wis. Stat. § 283.31(3) provides that a permit may issue only when discharges will meet all effluent limitations, standards of performance for new sources, effluent standards, and any more stringent limitations necessary to comply with any applicable federal law or regulation, but this provision is silent as to how the State prohibits discharges that would violate applicable water quality standards of affected states. Wisconsin must explain how it will address the deficiency noted in this comment, either through statutory amendment or corrective rulemaking, including a schedule and milestones for completion, or by citing existing, specific authority in a written explanation from the State’s Attorney General.

13. The federal rule at 40 C.F.R. § 122.44(k) identifies circumstances in which best management practices (BMP) must be included as conditions in permits. Except for the practices in Wis. Admin. Code NR §§ 216 and 243 pertaining to storm water and concentrated animal feeding operations, respectively, EPA did not find that Wisconsin has a statutory or rule provision requiring incorporation of BMPs into permits as provided in 40 CFR § 122.44(k). The response to this letter needs to include the State’s plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.44(k).

14. The federal rule at 40 C.F.R. § 122.44(l) generally provides that the interim effluent limitations, standards, and conditions in a reissued or renewed permit must be at least as stringent as the final limitations, standards, and conditions in the previous permit. EPA did not find an equivalent Wisconsin statutory or rule provision. The response to this letter needs to

include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.44(l).

15. The federal rule at 40 C.F.R. § 122.47 pertains to compliance schedules in permits. Except for problematic provisions noted elsewhere in this enclosure, EPA did not find an equivalent Wisconsin statutory or rule provision to implement this federal requirement. EPA reviewed Wis. Admin. Code NR § 106.117, but this rule is inconsistent with the federal requirement for several reasons, including that it: (a) only applies to WQBELs for toxic and organoleptic substances, (b) allows time to be added to a schedule so a permittee can perform work intended to justify a change in an effluent limitation, (c) does not include an "appropriateness" standard for the granting of a schedule, (d) does not require reports on progress toward meeting the final limitation, (e) does not mandate interim requirements, and (f) does not restrict schedules to statutory deadlines. In addition to establishing a compliance schedule rule with program-wide applicability, Wisconsin must amend Wis. Admin. Code NR § 106.117 to resolve the inconsistencies noted here. The response to this letter must include the State's plan for promulgating a rule equivalent to 40 C.F.R. § 122.47, and for correcting issues outlined in number 15 (a) – (f) above.

16. The federal rule at 40 C.F.R. Part 403 establishes requirements for pretreatment of nondomestic discharges to publicly-owned treatment works (POTWs). EPA revised this rule and related NPDES provisions at 40 C.F.R. §§ 122.21(j)(6)(ii), 122.44(j)(1), and 122.62(a)(7), in 2005. Some of the revisions make the federal program less stringent than it used to be. Wisconsin can choose to incorporate these revisions into its pretreatment program. However, some of the revisions make the federal program more stringent than the predecessor rule. EPA described the more stringent provisions at: http://www.epa.gov/npdes/pubs/pretreatment_streamlining_required_changes.pdf. Under 40 C.F.R. § 123.62, Wisconsin was required to adopt the more stringent provisions by November 2006, but the State has not done this. Wisconsin must adopt the more stringent provisions into its code. The response to this letter needs to include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. Part 403.

17. The Wisconsin rule at Wis. Admin. Code NR § 106.10 excludes noncontact cooling water from WQBELs, except to the extent that the limitations are for water treatment additives. Under the rule, water treatment additives do not include those compounds added at a rate and quantity necessary to provide a safe drinking water supply, or the addition of substances similar in type and amount to those typically added to a public drinking water supply. The relevant federal rule at 40 C.F.R. § 122.44(d)(1)(i) requires WQBELs for all pollutants that are or will be discharged at a level which will cause, have a reasonable potential to cause, or contribute to an excursion beyond applicable water quality criteria. Accordingly, Wisconsin must revise Wis. Admin. Code NR § 106.10 so it conforms to 40 C.F.R. § 122.44(d). To the extent that Wisconsin wants to consider intake pollutants when determining reasonable potential and setting WQBELs for discharges within the Great Lakes basin, the revised rules must conform to 40 C.F.R. part 132, Appendix F, Procedure 5, paragraphs D. and E. The response to this letter must include the State's plans, with a schedule and milestones, for revising Wis. Admin. Code NR § 106.10 so it conforms to 40 C.F.R. § 122.44(d).

18. The federal rule at 40 C.F.R. § 122.22 (d) requires that anyone signing a permit application or a report required under 40 C.F.R. § 122.22(a) or (b) certify that the information: is accurate and complete, was gathered by qualified persons, and was properly gathered and evaluated.²

Wisconsin's rule at Wis. Admin. Code NR § 205.07(1)(g), while including that signatories make a certification that the information they are submitting is "true, accurate, and complete," does not require inclusion of the information quality certification language set out in § 122.22 (d). The response to this letter must include the State's plans with a schedule for promulgating a rule equivalent to 40 C.F.R. § 122.22(d).

19. The federal rule at 40 C.F.R. § 122.24 pertains to concentrated aquatic animal production facilities. EPA did not find an equivalent Wisconsin statutory or code provision. The response to this letter must include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.24.

20. The federal rule at 40 C.F.R. § 122.50 provides for an adjustment to effluent limitations when part of a discharger's process wastewater is disposed into wells or POTWs or by land application. EPA did not find an equivalent Wisconsin statutory or code provision. The response to this letter must include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.50 if Wisconsin permits or wants to permit part of a discharger's process wastewater to be disposed into wells or POTWs or by land application.

21. The federal rule at 40 C.F.R. § 124.56 contains a description of elements to be included in fact sheets, including where explanations of specific permit conditions are required. Wisconsin's rules do not appear to have an equivalent provision. The response to this letter must identify the required rule provisions or include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 124.56.

22. The federal rule at 40 C.F.R. § 124.10 requires that draft permits be sent to a variety of agencies as well as the applicant. We understand that Wisconsin provides electronic access to information regarding a permit application. Wisconsin's response to this letter must explain how its practice of providing notice is equivalent to the public notice requirement found at § 124.10(c) or what steps, taken on what timetable, the State will take to cure deficiencies in the State analog.

23. Wisconsin law at Wis. Stat. § 30.2022(1) provides that "activities affecting waters of the state, as defined in s. 281.01 (18), that are carried out under the direction and supervision of the department of transportation in connection with highway, bridge, or other transportation project design, location, construction, reconstruction, maintenance, and repair are not subject to the prohibitions or permit or approval requirements specified under ... chs. 281 to 285 or 289 to 299." This provision does not conform to 40 C.F.R. §§ 123.1(g)(1) (requiring approved states to

² The certification provided at 40 C.F.R. § 122.22(d) states: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

prohibit point source discharges including, but not limited to, storm water discharges as provided in 40 C.F.R. § 122.26, unless such discharges are in compliance with a permit issued under the federally approved state program) and 123.25(a)(4) (providing that approved states shall require any person who discharges or proposes to discharge to apply for a permit).

Wis. Admin. Code § NR 216.42(5) (which appears to implement Wis. Stat. § 30.2022(1) and (2) with respect to storm water discharges from Department of Transportation (DOT) construction sites) exempts DOT project from NPDES permit coverage by providing that such discharges “shall be deemed to be in compliance with s. 283.33, Stats., and the requirements of ch. NR 216, Subchapter III, if the project from which the discharges originate is in compliance with Trans 401 Wis. Admin. Code and the liaison cooperative agreement between WDNR and DOT. . . Unless EPA formally approves the division of NPDES permitting responsibility between WDNR and DOT (or any other state agency), and DOT prohibits discharges without a permit, Wisconsin cannot simply exempt DOT projects from NPDES permitting requirements. If the State has divided permitting authority for various categories of projects, the State’s response to this letter must describe the division of permitting authority. EPA must review and approve any agreement to divide permitting authority before any permits issued by DOT or any other agency of the State will be considered equivalent to NPDES permits. Such a review, if it occurs, is intended to ensure that the implementing agencies have legal authority and are acting consistent with federal program requirements including permit issuance; sufficiency of public notice, hearing, and judicial review requirements; compliance evaluation; and enforcement authority. If the State has divided permitting authority, then Wisconsin must include the State’s plan, with a schedule and milestones, for correcting the deficiency with Wis. Admin. Code § NR 216.42(5).

EPA has additional concerns if Wisconsin purports that Wis. Admin. Code § NR 216.42(5) establishes an NPDES “permit-by-rule.” For example, the authorities cited in that administrative code provision (Wis. Admin. Code § Trans 401 and the “liaison cooperative agreement”): (1) are not subject to EPA review and potential objection under 40 C.F.R. § 123.44, (2) are likely not subject to reissuance proceedings (including notice and the opportunity for the public to comment) once every five years, (3) likely do not require terms and conditions that are standard to all NPDES permits, and (4) may not be subject to judicial review as required for NPDES permits by 40 C.F.R. § 123.30. Furthermore, the text of the rule is not written to provide, consistent with Wis. Admin. Code § NR 205.08(5), that WDNR may require any point source covered by a general permit to obtain an individual permit, and that any person may petition WDNR to require an individual permit for a source covered by a general permit.

Wisconsin’s response to this letter must provide a plan with appropriate milestones for amending Wis. Stat. § 30.2022(1) and Wis. Admin. Code § NR 216.42(5) to conform to federal NPDES requirements.

24. The Wisconsin rules at Wis. Admin. Code §§ NR 216.42(4), (6), and (9) provide that certain dischargers of storm water “shall be deemed to hold a NPDES permit” or may be “determine[d] to be in compliance with permit coverage required under s. 283.33 Stats.” where such projects are regulated by the Wisconsin Department of Commerce or environmental programs other than the WPDES program. EPA has virtually identical concerns about these provisions as those

communicated in the second and third paragraphs of comment 23, above.³ In addition, we are concerned that Wis. Admin. Code § NR 216.42(6) may not conform to 40 C.F.R. 123.1(g)(1) and 123.25(a)(4). Wisconsin's response to this letter must provide a plan with appropriate milestones for amending all of these provisions to conform to federal NPDES requirements.

25. The Wisconsin rule at Wis. Admin. Code § NR 216.415(4) provides that a landowner of a construction site that is regulated by an authorized local municipal program is deemed to be covered under a department construction site storm water permit issued pursuant to Wis. Admin. Code § NR 216, Subchapter III. EPA has three concerns about this provision.

First, because the CWA does not provide for authorizing local governments to implement NPDES authorities, we are concerned about the apparent division of NPDES program responsibilities between WDNR and authorized municipalities. While the State's rule provides that authorized programs will grant permit coverage under WDNR's construction stormwater general permit, the rule also allows authorized municipalities to issue "equivalent" notice of intent forms, and appears to allow municipalities to take the lead for inspections and enforcement. While we encourage states to find supplemental resources to improve NPDES program implementation, the state's primary responsibility for NPDES program implementation, including compliance evaluation and enforcement, cannot be subdivided with local governments. We are concerned that although WDNR retains the ability to take enforcement actions for dischargers under authorized municipal programs, the provision lacks a mechanism to allow the timely notification of WDNR and consequently places the primary responsibility for compliance and enforcement with the authorized municipality, which is required to report to WDNR only an annual "estimate" of "the number of construction site inspections performed and citations issued." Wis. Admin. Code NR § 215.415(8)(b)(3). Wisconsin's response to this letter must provide an updated program description that explains, pursuant to 40 C.F.R. § 123.22, how Wisconsin's authorized municipality program is consistent with the State's retention of primary NPDES permitting and compliance evaluation responsibility under 40 C.F.R. §§ 123.25 – 123.27. If the State has not retained primary NPDES program responsibility where municipalities have become authorized, then the response to this letter must provide a plan with appropriate milestones for amending the existing state provisions to conform to federal NPDES requirements.

Second, Wis. Admin. Code § 216.415(4) appears to preclude the State from requiring a landowner who seeks coverage under the general permit to obtain, where appropriate, an individual permit under Wis. Admin. Code s. NR 205.08(5). While Wis. Admin. Code § 216.415(6) provides that an authorized municipality may deny coverage under the general permit, there appears to be no provision for an applicant to seek individual permit coverage (see 40 C.F.R. § 122.28(b)(3)).⁴ In its response to this letter, Wisconsin must provide a plan with

³ We understand that Wisconsin recently re-established a role for the Department of Commerce (now the Department of Safety and Professional Services) with respect to erosion control during the construction of commercial buildings. 2011 Wis. Act 32, § 2896 – 2905, 9135 (June 26, 2011).

⁴ We note that there is such a provision directing landowners to contact WDNR to resolve issues and seek permit coverage where projects involve wetlands, endangered species, and historic properties. Wis. Admin. Code § NR 216.415(7)(b).

appropriate milestones for amending Wis. Admin. Code § 216.415 to conform to federal NPDES requirements.

Third, while the federal rules governing general permits allow for the possibility that a state may choose not to require notice of intent forms be filed for general permit coverage for certain categories of dischargers (see 40 C.F.R. § 122.28(b)(2)(v)), this exemption does not apply to sites where five acres of land or more will be disturbed (see 40 C.F.R. § 122.28 (b)(2)(v) (made applicable to states by 40 C.F.R. § 123.25(a)(11))). Wisconsin's response to this letter must provide a plan with appropriate milestones for amending Wis. Admin. Code § NR 216.415(4) to conform to federal NPDES requirements.

26. The State's regulations at Wis. Admin. Code s. NR § 216.022 appear to create an exclusion for those Municipal Separate Stormwater System (MS4) dischargers which are in compliance with an Memorandum of Understanding with another agency of the State. Unless EPA formally approves the bifurcation of NPDES responsibilities between WDNR and other State agencies, and the other agencies prohibit discharges without a permit, WDNR cannot exclude these MS4s from NPDES permitting requirements. As stated in comment 22 above, EPA must review and approve any such arrangements regarding the divisibility of permitting authority to ensure that federal program requirements are met. The State's response to this letter must identify any MS4s that are the subject of such an arrangement, including a description of the authorities and responsibilities covered. It must also include the State's plan, with a schedule and milestones, for correcting the problem identified with Wis. Admin. Code NR NR § 216.022.

27. Wisconsin law at Wis. Stat. § 283.19(2)(b) defines the term "new source" to mean "any source, the construction of which commenced after the adoption of the standard of performance applicable to the category of sources of which it is a member." The definition appears in a section that requires WDNR to promulgate, by rule, standards of performance for classes and categories of point sources. Given its placement, the definition appears to have the effect of establishing that a source is a new source if construction commenced after WDNR promulgated applicable standards of performance by rule. The federal regulation at 40 C.F.R. § 122.2 defining "new source" defines such sources as those constructed after the adoption of standards of performance applicable to such source under CWA § 306, 33 U.S.C. § 1316. The State definition of new source, therefore, appears to provide an exemption from new source performance standards between the date of federal promulgation and the date of State adoption. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through an amendment to the statute or corrective rulemaking (and associated milestones and timetables).

28. To ensure that substances are not present in amounts that are acutely harmful to aquatic life in all surface waters, including those portions of mixing zones normally inhabitable by aquatic life, Wis. Admin. Code NR NR §§ 106.06(3)(b), 106.32(2)(b), and 106.87(1) provide that effluent limitations shall be set equal to the final acute value (FAV). The State rule as written appears to deviate from the federal requirement at 40 C.F.R. § 122.44(d)(1)(vii)(A), which provides that WQBELs must be derived from and comply with water quality standards, in the following three instances:

- (a) Acute water quality criteria will be exceeded in a stream or river when the effluent

limit is equal to the FAV and the effluent flow rate is one-half or more of the flow rate in the receiving waters;

(b) Limitations set equal to the FAV may not meet the requirements for mixing zones in Wis. Admin. Code NR § 102.05(3)(b); and

(c) A discharge equal to the FAV may cause chronic toxicity absent companion limits based on chronic water quality criteria.

In its response to this letter, Wisconsin must explain how it will address the deficiencies noted in this comment. If Wisconsin asserts that it has the authority necessary to address these deficiencies, the State must provide a written opinion from the Attorney General specifically identifying what authority the State will use to set effluent limits less than the FAV in the situations identified in comment 25 (a) – (c). If the State lacks the authority to implement 40 C.F.R. § 122.44(d)(1)(vii)(A), then Wisconsin must include the State's plan, with a schedule and milestones, for correcting the deficiencies noted above.

29. The Wisconsin rule at Wis. Admin. Code NR § 106.13 provides, in part, that WNDR “shall, within its capabilities, ... establish an appropriate compliance schedule” where leachate from a solid waste facility affects the ability of a POTW to meet WQBELs for toxic or organoleptic substances. The text of the rule leaves ambiguous whether the State is mandating the establishment of a compliance schedule or whether establishing such a schedule is discretionary. If the rule mandates a compliance schedule, the rule must be revised to be consistent with 40 C.F.R. § 122.47. In its response to this letter, Wisconsin must explain how the rule operates and how it will address any deficiency through corrective rulemaking.

30. The Wisconsin rule at Wis. Admin. Code NR § 106.32(2)(a) provides that ammonia limits based on acute water quality criteria shall be expressed as daily maxima. For continuous discharges, 40 C.F.R. § 122.45(d) provides that effluent limits must be expressed as seven-day average and average monthly limits for POTWs,⁵ and maximum daily and average monthly limits for other discharges. Please identify in your response to this letter the basis for the State's authority to supplement daily maximum limits with average monthly limits based on acute criteria for ammonia. If such authority does not exist, the response must include the State's plan, with a schedule and milestones, for amending the rule so it is consistent with 40 C.F.R. § 122.45(d).

31. Wisconsin rules at Wis. Admin. Code NR §§ 106.32(2)(b)2, 106.32(3)(a)4.a, and 106.37(2) provide that Wisconsin shall or may add time to a compliance schedule so a permittee can gather data or perform demonstrations to justify a change in effluent limits. Section 502(17) of the CWA, 33 U.S.C. § 1362(17), defines a compliance schedule as an “enforceable sequence of actions or operations leading to compliance with an effluent limitation.” A demonstration or data collection that is intended to justify a change in an effluent limitation is not an action leading to compliance with a final effluent limitation under the CWA, and a schedule based solely on time needed to perform such a demonstration or collect such data is not appropriate under 40 C.F.R. § 122.47. Wisconsin must revise these provisions to make them consistent with

⁵ Section 5.2.3 of the *Technical Support Document for Water Quality-based Toxics Control*, EPA/505/2-90-001), recommends maximum daily and monthly average limits for toxic pollutants in POTW permits.

federal requirements. The response to this letter needs to include the State's plan, with a schedule and milestones, for amending these rules so they conform to 40 C.F.R. § 122.47.

32. Wis. Admin. Code NR § 106.07(8) provides that a permittee may ask for time to be added to compliance schedule to complete work with the intent of modifying limitations based on "secondary" (e.g., Tier II) values. While 40 C.F.R. Part 132, Appx. F, procedure 9, allows time to be added to a compliance schedule for this purpose within the Great Lakes basin, 40 C.F.R. § 122.47 does not allow time to be added outside the basin. The State provision must be modified to clarify that this exception applies only to dischargers within the Great Lakes basin.

33. Wisconsin rules at Wis. Admin. Code NR §§ 106.32(3)(c)(2) and 106.32(4)(d) provide that certain effluent limitations may be based on real time conditions. Does Wisconsin have current or administratively continued permits that implement either of these provisions? If so, how does the State receive and manage discharge monitoring reports and other data to evaluate compliance?

34. The Wisconsin rule at Wis. Admin. Code NR § 106.32(5)(c) provides that effluent limitations based on acute, four-day average chronic, and 30-day average chronic criteria must be expressed as daily maxima, weekly averages, and 30-day averages, respectively. For continuous dischargers, 40 C.F.R. § 122.45(d) provides that effluent limitations shall be expressed as seven-day average and average monthly limits for POTWs and maximum daily and average monthly limits for other dischargers. Under what authority can Wisconsin supplement limits that are expressed in accordance with Wis. Admin. Code NR § 106.32(5)(c) such that permits comply with the requirements of 40 C.F.R. § 122.45(d)? If such authority does not exist, the response must include the State's plan, with a schedule and milestones, for amending the rule so it conforms to 40 C.F.R. § 122.45(d).

35. The federal rule at 40 C.F.R. § 122.44(d) requires a permit issuing agency to determine whether pollutants are or may be discharged at a level that will cause, have a reasonable potential to cause, or contribute to an in-stream excursion beyond a water quality criterion, including a criterion for ammonia. To the extent that an NPDES authority makes a determination in the affirmative, the federal rule requires the permit to include effluent limits which are derived from and comply with water quality standards. Wis. Admin. Code NR § 106.33(2) provides that the State may not include ammonia limitations in a permit when a calculated WQBEL is greater than 20 mg/L in the summer or 40 mg/L in winter. EPA is concerned that the word "may" prevents Wisconsin from setting WQBEL despite a finding that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion. Additionally, EPA is concerned that, as written, the State's provision provides discretion to refrain from setting limits when the State finds that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion. In its response to this letter, Wisconsin must explain how it will address the concern noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the Attorney General.

36. The Wisconsin rule at Wis. Admin. Code NR § 106.34(2) provides that, except for discharges to outstanding and exceptional resource waters, "if the department determines that a water quality based ammonia effluent limitation in effect in a permit as of March 1, 2004 may be

increased in the next reissuance of that permit based solely on the application of the procedures in this subchapter, then the inclusion of the increased ammonia effluent limitation in the reissued permit is not subject to the provisions of ch. NR 207.” For discharges to waters other than outstanding and exceptional resource waters, the rule does not appear to conform to § 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. § 122.44(d). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State’s Attorney General.

37. Wis. Admin. Code NR § 106.37(1) allows compliance schedules greater than five years when an ammonia variance has been granted. 40 C.F.R. § 122.47 provides that a permit may include a compliance schedule when appropriate. It is not appropriate to provide a compliance schedule to meet an effluent limitation based on a variance from water quality standards. Therefore, the State provision needs to be modified to remove the possibility that a compliance schedule can be used to meet an effluent limitation that is based on a variance from water quality standards.

38. Wis. Admin. Code NR § 106.38 contains a process through which the owner or operator of a stabilization pond or lagoon system can obtain a variance from ammonia water quality criteria. Variances require EPA approval. Therefore, the State provision should, but does not have to, explain or reference Wisconsin’s process to seek EPA approval of proposed variances.

39. Wis. Admin. Code NR § 106.83(2) contains a process through which a discharger can obtain a variance from chloride water quality criteria. Variances require EPA approval. Therefore, the State provision should, but does not have to, explain or reference Wisconsin’s process to seek EPA approval of proposed variances.

40. Wis. Admin. Code NR § 106.88(1) provides, in part, that Wisconsin may include a WQBEL for chloride in a permit if such a limitation is deemed necessary in accordance with Wis. Admin. Code NR § 106.85. Use of the word “may” in this provision appears to make the establishment of a WQBEL discretionary. 40 C.F.R. § 122.44(d) mandates WQBELs whenever the permit issuing agency determines that a pollutant is present in a discharge at a level which will cause, have a reasonable potential to cause, or contribute to an excursion beyond a water quality criterion. Wisconsin must revise the rule to provide that a WQBEL shall be established when such a limit is deemed necessary.

The same rule allows Wisconsin to include a compliance schedule in a permit even when a discharger can meet a chloride WQBEL. 40 C.F.R. § 122.47 allows compliance schedules in permits when appropriate. It is not appropriate to include a compliance schedule in a permit when a discharger can meet an effluent limitation upon issuance of the permit. Therefore, the State provision must be modified to remove the possibility that a compliance schedule can be used when a discharger can meet an effluent limitation upon issuance of the permit, or the State should explain how its implementation of this provision is consistent with the described limitation set out in the federal program requirement.

41. Wis. Admin. Code NR § 106.88(4) provides that effluent limitations based on acute criteria shall be expressed as daily maxima and limitations based on chronic criteria shall be expressed

as weekly averages. For continuous dischargers, 40 C.F.R. § 122.45(d) provides that effluent limitations shall be expressed as seven-day average and average monthly limits for POTWs; and maximum daily and average monthly limits for other dischargers. Under what authority can Wisconsin supplement limits that are expressed in accordance with Wis. Admin. Code NR § 106.88(4) such that permits comply with the requirement of 40 C.F.R. § 122.45(d)? If such authority does not exist, the response to this letter must include the State's plan, with a schedule and milestones, to bring its regulation into conformity with the federal rule.

42. The Wisconsin rules at Wis. Admin. Code NR §§106.89(2) and (3), provide that where WQBELs for chloride are deemed necessary pursuant to Wis. Admin. Code NR § 106.87(1), whole effluent toxicity limitations (WET) may be held in abeyance during a source reduction period if chloride exceeds a threshold of 2,500 mg/L, or if the effluent concentration is less than 2,500 mg/L but exceeds the calculated acute WQBEL, where chloride is the sole source of acute toxicity. 40 C.F.R. § 122.44(d)(1)(v) provides, in part, that limitations on WET are not necessary when the permit-issuing agency demonstrates in the fact sheet or statement of basis for the permit, using the procedures in 40 C.F.R. § 122.44(d)(1)(ii), that chemical-specific limitations are sufficient to attain and maintain the applicable numeric and narrative water quality standards. During discussions between EPA and WDNR, Wisconsin explained that it implements Wis. Admin. Code NR §§ 106.89(2) and (3) in accordance with 40 C.F.R. § 122.44(d)(1)(v) with respect to permits that contain a chemical-specific WQBEL for chloride. Please confirm that this is the State's approach. If corrective rulemaking is required to address a deficiency in the rule, the State must explain in its response to this letter what timetable the State will follow to address the deficiency.

EPA's review suggests that Wis. Admin. Code NR §§ 106.89(2) and (3) do not conform to the CWA § 301(b)(1)(C) and 40 C.F.R. § 122.44(d) (requiring a WQBEL when a discharge will cause, have a reasonable potential to cause, or contribute to an excursion beyond an applicable water quality criterion expressed in terms of toxicity) when Wisconsin holds a WET limit in abeyance because chloride exceeds a threshold but the permit does not contain a chemical-specific WQBEL for chloride. Another interpretation would be that the State could implement "held in abeyance" such that the permit includes the WET limit but compliance with the limit is not required until the end of a compliance schedule. Therefore, in response to this letter, please explain how Wisconsin implements Wis. Admin. Code NR §§ 106.89(2) and (3) when chloride exceeds one or more of the specified thresholds, and provide the State's explanation of how these provisions are consistent with the federal requirement, or provide the State's plan to correct these provisions to make them consistent with the federal requirement.

43. The Wisconsin regulation at Wis. Admin. Code NR § 106.91 allows Wisconsin to set a chloride limit, other than the WQBEL, when a POTW is not able to meet a WQBEL due to indirect discharges from a public water system treating water to meet the primary maximum contaminant levels specified in Wis. Admin. Code NR § 809. This rule does not conform to CWA § 301(b)(1)(C) and 40 C.F.R. § 122.44(d). Therefore, the State provision must be modified to be consistent with the federal requirement. To the extent that Wisconsin implements the rule as a variance, such variances are subject to EPA approval.

44. (a) Wisconsin's definition of "point source" in Wis. Admin. Code NR § 205.03(27) does not

specify landfill leachate collection systems even though such systems are expressly included in the federal definition in 40 C.F.R. § 122.2 [and applicable to state programs, see 40 C.F.R. § 123.2]. During discussions, WDNR explained that the agency has issued WPDES permits for discharges from landfill leachate collection systems. In response to this letter, please provide an explanation of Wisconsin's authority to issue WPDES permits for landfill leachate collection systems and provide the permit numbers for such permits and the names of the permittees.

(b) Wisconsin's definition of "pollutant" in Wis. Admin. Code NR § 205.03(28) does not specify filter backwash as a pollutant even though filter backwash is expressly enumerated as a pollutant in 40 C.F.R. § 122.2 [and applicable to state programs, see 40 C.F.R. § 123.2]. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

45. The federal regulation at 40 C.F.R. § 122.5 explains the effect of a permit. It includes permit as a shield, use of a permit as an affirmative defense, prohibition of the use of a permit as a property interest, and prohibition of the use of a permit as an authorization to injure persons or property. This provision appears to have no equivalent in Wisconsin's rules. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

46. The federal regulation at 40 C.F.R. § 122.21(o) contains a provision for expedited variance procedures or time extensions for filing requests for variances. The Wisconsin rules do not contain this provision. Is this an instance where Wisconsin wishes to implement a more stringent authorized program, or is this an oversight? In its response to this letter, Wisconsin should explain that it implements a more stringent program or how it will address this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

47. Wisconsin's regulations at Wis. Admin. Code NR § 205.07(1)(g) provide that the signatory to a permit can be a "person authorized by one of those officers or officials and who has responsibility for the overall operation of the facility or activity regulated by the permit." However, there is no requirement for how the authorization will be documented or any requirements that apply. While EPA's regulations at 40 C.F.R. § 122.22 do not require a demonstration that a corporate officer has the requisite authority to sign permit documents, Wisconsin's regulations appear to allow non-corporate officers to sign such documents without providing an accountable process for such delegation of authority. In its response to this letter, Wisconsin should explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

48. Wisconsin's regulations do not include permit "termination" as a consequence of violating the permit, as provided by the federal regulations at 40 C.F.R. § 122.41(a). Wisconsin should explain whether and how its rules are consistent with this federal requirement, even if the specific terminology used in the State's rules differ. If corrective rulemaking is required to

address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this potential deficiency.

49. The federal regulations at 40 C.F.R. § 122.41(l)(1)(i) require that a permitted facility must provide notice where, because of an alteration or addition to a permitted facility, the facility may meet one of the criteria for defining a new source (40 C.F.R. § 122.29(b)). Wisconsin should explain how its provision at Wis. Admin. Code NR § 205.07(1)(q)(1) is equivalent to this federal requirement. If corrective rulemaking is required to address this potential deficiency, the State must explain in its response to this letter what timetable the State will follow.

50. Federal regulations at 40 C.F.R. § 124.5 (a) – (d) provide for termination of permits. Wisconsin regulations do not appear to provide for permit termination. Specifically, the Wisconsin regulations lack an equivalent provision for “notice of intent to terminate,” as specified in 40 C.F.R. § 124.5(d). The State must explain how its regulations are consistent with the federal requirement. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow.

51. Federal regulations at 40 C.F.R. § 124.11 provide that “any interested person . . . may request a public hearing, if no hearing has already been scheduled,” as long as the request is in writing and states the nature of the issues proposed to be raised in the hearing. The regulation at 40 C.F.R. § 124.12 provides that a hearing shall be held if the Director finds on the basis of requests that there is significant public interest in the draft permit. The Wisconsin rules governing public hearings appear to be set out in Wis. Admin. Code NR § 203.10(5) and Wis. Stat. 283.49 (public hearing), and limit hearing requests to those made by groups of five or more petitioners. Wisconsin must explain how its provisions for allowing requests for hearing are consistent with federal requirements. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this potential deficiency.

52. Wis. Admin. Code NR § 216.21(2)(b) excludes access roads and rail lines from tier 2 category industries. They are included within the federal analog at 40 C.F.R. § 122.26(b)(14). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State’s Attorney General.

53. Wis. Admin. Code NR § 216.21(3)(e)(2) does not require that the facility submit its latitude and longitude when certifying ‘no exposure.’ This information is required under 40 C.F.R. § 122.26(g)(4)(ii). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State’s Attorney General.

54. Wis. Admin. Code NR § 216.42(1) requires a permit for discharges from construction sites that are one or more acre in size. However, Wisconsin does not include the requirement found in 40 C.F.R. § 122.26(b)(15)(i) that disturbances less than one acre, when part of a common plan of development that disturbs more than one acre, also require permit coverage for discharges. Wisconsin’s definition of “construction site” at Wis. Admin. Code NR § 216.002(2) includes

common plan language but does not explicitly include areas less than one acre. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or in by citing existing, specific authority in a written explanation from the State's Attorney General.

55. Under 40 C.F.R. § 122.26(b)(2), illicit dischargers to an MS4 are defined as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit. . . and discharges resulting from fire fighting activities." The State definition of illicit discharges appears to exempt many more classes of activities from the definition. As a result, the requirement that MS4s identify illicit discharges pursuant to Wis. Admin. Code NR § 216.07(3), appears less comprehensive, and therefore less stringent, than the federal requirement found at 40 C.F.R. § 122.34(b)(iii), which requires MS4s to address all illicit discharges ". . . which are [] found to be a significant contributor of pollutants to the [MS4]." In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

56. Wis. Admin. Code NR § 216.07(8) provides for an annual report. The rule does not include the requirements of 40 C.F.R. § 122.34(g)(3)(v) pertaining to notice that the permittee is relying on another government entity to satisfy some of the permit obligations. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or in a written explanation from the State's Attorney General.

57. The annual report required by Wis. Admin. Code NR § 216.07 lacks provisions equivalent to 40 C.F.R. § 122.42(c)(2) (proposed changes to the storm water management programs that are established as permit condition). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

58. Wisconsin's definition of "waters of the state" in Wis. Admin. Code NR § 205.03(44) does not refer to mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, or playa lakes. These categories are included in the definition of "waters of the United States" as set out at 40 C.F.R. § 122.2, which includes these categories where "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters." Are the more specific categories in the federal definition included under the umbrella language of Wis. Admin. Code NR § 205.03(44) which states "and other surface or groundwater, natural or artificial, public or private within the state or under its jurisdiction. . . ." In its response to this letter, Wisconsin must explain how it will address the potential deficiency noted in this comment, either through corrective rulemaking or in a written explanation from the State's Attorney General citing existing, specific authority

59. Wisconsin appears to exempt from NPDES permitting "the disposal of solid wastes, including wet or semi-liquid wastes, at a site or operation licensed pursuant to chs. NR 500 to 536, except as required for municipal sludge in ch. NR 204 or where storm water permit coverage is required under ch. NR 216." (Wis. Admin. Code NR § 200.02.) This exclusion goes beyond those exclusions enumerated at 40 C.F.R. § 122.3. Wisconsin must explain whether the

State prohibits discharge of such materials and whether Wisconsin requires permits for such discharges when they occur. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

60. Wisconsin appears to exempt from NPDES permitting "discharges from private alcohol fuel production systems as exempted in s. 283.61, Stats." Wis. Admin. Code NR § 200.03(3)(f), and Wis. Stat. § 283.61 provide that the exemption applies where the waste product "discharge or disposal is confined to the property of the owner." (Wis. Stat. § 283.61(2).) Does Wisconsin allow the discharge exemption where waters of the United States are located within, or traverse through, privately-owned property? In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through statutory amendment, corrective rulemaking, or by citing existing, specific authority in a written explanation from the State's Attorney General.

61. Wisconsin appears to lack rules that establish permit application requirements for the following categories of dischargers: existing manufacturing, commercial, mining, and silvicultural dischargers (40 C.F.R. § 122.21(g)); aquatic animal production facilities (40 C.F.R. § 122.21(i)); new sources and new discharges (40 C.F.R. § 122.21(k)); and facilities with cooling water intake structures (40 C.F.R. § 122.21(r)). Wisconsin must document where permit application requirements for these categories of discharges are set out. If corrective rulemaking is required to address a deficiency, the State must explain in its response to this letter what timetable the State will follow.

62. Wisconsin regulations allow a permit to be "suspended," an action that is not included in the federal regulations (federal regulations provide for permit revocation and reissuance or permit termination (40 C.F.R. § 122.41(f)). The federal regulations contemplate "revocation and reissuance" as a separate action from termination for cause. Revocation and reissuance is generally used if transfer of a permit (because of ownership change) is not appropriate or if there has been a significant change in the nature of a discharge to warrant a new permit. The federal regulations provide that a permit may be terminated for cause, as set out in 40 C.F.R. § 122.64. It is unclear whether Wisconsin (which does not use the term "termination") is able to exercise equivalent authorities to those permit actions identified in 40 C.F.R. § 122.41(f). The State must document the scope and basis of its authorities to cover the requirements in 40 C.F.R. § 122.41(f). If corrective rulemaking is required to address a deficiency, the State must explain in its response to this letter what timetable the State will follow.

63. Wisconsin rules appear to lack a provision which allows the State to assess multiple penalties for multiple instances of knowingly making false statements. This requirement is found in the federal regulations at 40 C.F.R. § 123.27. Wisconsin must document where it has the equivalent authority required to address cases involving multiple false statements. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the state will follow to address this deficiency.

64. Wisconsin does not appear to have a provision equivalent to 40 C.F.R. § 123.27(d), which provides for public participation in the enforcement process (including provisions to allow

intervention as of right in any civil or administrative action; or assurance that the State will provide written responses to requests to investigate and respond to citizen complaints, provide for permissive intervention, and provide public notice and comment on proposed settlements). Wisconsin must document where it has the equivalent authority required by 40 C.F.R. § 123.27(d). If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

65. Federal regulations require the preparation of a draft permit where a state determines to proceed to permit issuance following receipt of a complete permit application. Wisconsin appears to lack provisions equivalent to 40 C.F.R. § 124.6, which provides the informational and procedural requirements for preparation of a draft permit. The State must document where it has the equivalent authority required by 40 C.F.R. § 124.6. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

66. Federal regulations require the preparation of a fact sheet for every NPDES facility or activity, with fact sheet contents and processes outlined in 40 C.F.R. §§ 124.8 and 124.56. Wisconsin appears to require fact sheets only for discharges having a volume of more than 500,000 gallons/day (and no fact sheets are required for storm water dischargers). Wisconsin must explain whether and how it has the authority to meet the requirements of 40 C.F.R. §§ 124.8 and 124.56. If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

67. The Wisconsin rules for small MS4s do not contain provisions equivalent to 40 C.F.R. § 122.34(g)(1) (required storm water management program evaluation) and (2) (records must be available to the public). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

68. The CWA requires that effluent limitations will be established "in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989." 33 U.S.C. § 1311(b)(2)(F). Wisconsin law requires effluent limitations to be established "not later than 3 years after the date effluent limitations are established, but in no case before July 1, 1984 or after July 1, 1987. Wis. Stat. § 283.13(2)(f). The State must explain the basis for the discrepancy of dates given in the State provision. If a statutory amendment is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

69. Wisconsin law appears to allow the State to waive compliance with any requirement in Wis. Stat. § 283 to prevent an emergency threatening public health, safety, or welfare. This exemption is not provided for in the federal program. State staff explained that they do not believe this provision has ever been implemented. The State must explain the intent of the provision and how this exemption is consistent with the federal program. If statutory amendment is required to address this deficiency, the State must explain in its response to this letter what timetable the

State will follow to address this deficiency.

70. Wis. Admin. Code NR §106.05(8) provides that a permittee may request “alternative limits” when an analytical test method is not sufficiently sensitive, despite a determination by the State that the discharge may cause or contribute to an excursion beyond the applicable water quality standards. Any permit that included such limits would not conform to § 301(b)(1)(C) of the Clean Water Act and 40 C.F.R. § 122.44(d). In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State’s Attorney General.

71. Wis. Admin. Code NR § 106.06(2) contains a note expressing the State’s intent to develop a rule to phase-out mixing zones for existing dischargers of bioaccumulative chemicals of concern (BCC). Wisconsin must establish such a rule for discharges within the Great Lakes basin. Under 40 C.F.R. Part 132, such mixing zones for Great Lakes dischargers are being phased out beginning in November 2010. In its response to this letter, Wisconsin needs to provide a plan, with a schedule and milestones, for revising the rule to phase out mixing zones for BCCs.

72. When calculating effluent limitations, Wis. Admin. Code NR §§ 106.06(4)(c)(5), (8), and (10) mandate that the State allow the discharge to be diluted with a defined quantity of the receiving water. These provisions appear to allow continued violations of water quality standards when the receiving waters are impaired for a pollutant that is present in a discharge. In addition, it is unclear whether the dilution mandate is subject to, and constrained by, the mixing zone provisions in Wis. Admin. Code NR § 102.05(3). In its response to this letter, Wisconsin needs to explain how it will address the deficiency noted in this comment, either through corrective rulemaking or in a written explanation from the State’s Attorney General. A written opinion of the State Attorney General must include an identification of the authority under which the State will set effluent limitation which are derived from and comply with water quality standards, as required by § 301(b)(1)(C) of the CWA and 40 C.F.R. § 122.44(d), the provisions of §§ 106.06(4)(c), (5), and (8) notwithstanding.

73. Wis. Admin. Code NR §§ 106.06(4)(c) 5 and 10 mandate that the State provide time for a discharger to complete mixing demonstrations. These provisions are contrary to the federal regulation at 40 C.F.R. § 122.47 to the extent that they require the time to be included in a compliance schedule in a permit. Please clarify whether the rules require the State to provide time before permit issuance or as a compliance schedule. If corrective rulemaking is required, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

74. Wis. Admin. Code NR §§ 106.08 and 106.09 mandate that the State include effluent limitations for whole effluent toxicity (WET) when it determines that such limits are necessary based on an evaluation of five or more samples. The rule includes a procedure for assessing effluent variability in this circumstance. The rule allows limitations for WET when fewer than five samples are available, but it does not include procedures that the State will use to assess variability in this circumstance. Wisconsin needs to revise the rule to mandate limitations when it determines, based on four or fewer samples, that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion above a WET criterion. In addition, the State

needs procedures for assessing effluent variability when four or fewer samples exist. See 40 C.F.R. § 122.44(d). If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

75. Wisconsin law at Wis. Stat. § 227.10(2m) was recently amended to provide that “No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter.”⁶ The response to this letter must include a statement from the Attorney General explaining the relationship between the limitation in Wis. Stat. § 227.10(2m), the permitting and enforcement provisions set forth in Wis. Stat. § 283 and the applicable administrative code provisions, and the federal requirements for permitting and enforcement authority for state NPDES permit programs set out in 40 C.F.R. §§ 123.25 and 123.27. If corrective legislation or rulemaking is required to ensure that the State has permitting and enforcement authority commensurate with 40 C.F.R. §§ 123.25 and 123.27, the State must explain in its response to this letter the timetable and milestones the State will follow to address this potential deficiency.

⁶ 2011 Wis. Act 21, § 1r (May 23, 2011).

New Chemical Test Methods

ASTM D6508, Dissolved Inorganic Anions by Capillary Ion Electrophoresis.
QuikChem Method 10-204-00-1-X, Cyanide using MICRO DIST and flow injection analysis.
Kelada-01, Automated Methods for Total Cyanide, Acid Dissociable Cyanide, and Thiocyanate.
Method CP-86.07, Chlorinated Phenolics by In situ Acetylation and GC/MS.
EPA Method 245.7, Mercury by Cold Vapor Atomic Fluorescence Spectrometry.
Standard Methods 4500-Cl, Chlorine by Low Level Amperometry.
ASTM D6888-04 Available Cyanide by Ligand Exchange-FIA.
ASTM D 6919-03, Cations and Ammonium in by Ion Chromatography.
Standard Method 4500-Cl-D. Chloride by Potentiometry.
ASTM D512-89 Chloride by Ion Selective Electrode.
Standard Method 4500-CN-F, Cyanide by Ion Selective Electrode.
ASTM D2036-98 A, Cyanide by Ion Selective Electrode.
Standard Method 4500-S2-G, Sulfide by Ion Selective Electrode.
ASTM D4658-92, Sulfide by Ion Selective Electrode.
Standard Method 4500-NO3-D, Nitrate by Ion Selective Electrode.
Method D99-003, Free Chlorine by Color Comparison Test Strip.
Method OIA-1677, DW Available Cyanide by Ligand Exchange_FIA.
Radium-226 and 228 by Gamma Spectrometry.
EPA Method 327.0, Chlorine Dioxide by Colorimetry.
EPA Method 300.1 for Anions.
EPA Method 552.3 for Dalapon.
Determination of Radium-226 and Radium-228 in Drinking Water by Gamma-ray Spectrometry Using HPGE or Ge(Li) Detectors.

Updated Chemical Test Methods

Method 200.2, Total Recoverable Elements Digestion.
Method 200.8, Metals by Inductively Coupled Plasma-Mass Spectrometry.
Method 200.9, Metals by Stabilized Temperature Graphite Furnace Atomic Absorption.
Method 218.6, Hexavalent Chromium by Ion Chromatography.
Method 300.0, Inorganic Anions by Ion Chromatography.
Method 353.2, Nitrate and Nitrite by Colorimetry.
Revisions to Methods 180.1, 200.7, 245.1, 335.3, 350.1, 351.2, 353.2, 365.1, 375.2, 410.4, and 420.4

Updated Versions of Currently Approved Methods

This rule approved about 200 updated methods, including:
An errata sheet for the whole effluent toxicity manuals.
74 newer versions of ASTM methods.
88 newer versions of Standard Methods from the 18th, 19th and 20th editions, but not the 21st.
19 methods published in the 16th edition of Official Methods of Analysis of AOAC International, 1995

Method Modifications, Analytical Requirements, and Reporting Requirements

The final rule includes a new section to introduce greater flexibility in the use of approved methods

The section describes the circumstances in which approved methods may be modified and the requirements that analysts must meet to use these modified methods in required measurements without prior EPA

approval

Sample Collection, Preservation, and Holding Time Requirements,

The rule includes many detailed changes to Table II, including:

The general sample preservation temperature from has changed 4 C to < 6.00 C.

For metals other than boron, hexavalent chromium, and mercury, the EPA will allow sample preservation with nitric acid 24 hours prior to analysis. In other words, acid preservation in the field for metals is not required.

Clarification that the start of a holding time for a grab sample would start at the time of sample collection. The holding time for a composite sample would start at the time the last grab sample component is collected

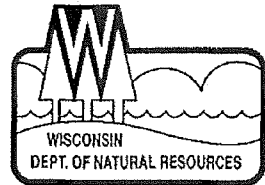
Withdrawal of Methods

The rule deletes Methods 612 and 625 as approved procedures for 1,2-dichlorobenzene, 1,3-dichlorobenzene, and 1,4-dichlorobenzene, and withdraws approval for all oil and grease methods that use Freon-113 as an extraction solvent.. In addition, the rule withdraws 105 methods contained in the EPA's Methods for the Chemical Analysis of Water and Wastes for which approved alternatives published by voluntary consensus standards bodies (i.e., ASTM and Standard Methods) are available. The methods that are deleted are listed below:

| | | | | |
|-------|-------|-------|-------|-------|
| 110.1 | 208.2 | 236.1 | 272.1 | 330.3 |
| 110.2 | 210.1 | 236.2 | 272.2 | 330.4 |
| 110.3 | 210.2 | 239.1 | 273.1 | 330.5 |
| 130.2 | 212.3 | 239.2 | 279.1 | 335.1 |
| 150.1 | 213.1 | 242.1 | 282.1 | 335.2 |
| 160.1 | 213.2 | 243.1 | 282.2 | 335.3 |
| 160.2 | 215.1 | 243.2 | 283.1 | 340.1 |
| 160.3 | 215.2 | 246.1 | 286.1 | 340.2 |
| 160.5 | 218.1 | 246.2 | 286.2 | 340.3 |
| 170.1 | 218.2 | 249.1 | 289.1 | 350.2 |
| 202.1 | 218.3 | 249.2 | 305.1 | 350.2 |
| 202.2 | 218.4 | 252.1 | 310.1 | 350.3 |
| 204.1 | 219.1 | 253.1 | 320.1 | 351.3 |
| 204.2 | 219.2 | 255.1 | 325.1 | 351.4 |
| 206.2 | 220.1 | 258.1 | 325.2 | 353.1 |
| 206.3 | 220.2 | 265.1 | 325.3 | 353.3 |
| 206.4 | 231.1 | 267.1 | 330.1 | 354.1 |
| 208.1 | 235.1 | 270.2 | 330.2 | 360.1 |
| 360.2 | 375.3 | 377.1 | 413.1 | |
| 365.2 | 375.4 | 405.1 | 415.1 | |
| 370.1 | 376.1 | 410.1 | 425.1 | |
| 375.1 | 376.2 | 410.2 | | |

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Cathy Stepp, Secretary
Telephone 608-266-2621
FAX 608-267-3679
TTY Access via relay - 711



October 14, 2011

Susan Hedman, Region V Administrator
United States Environmental Protection Agency
77 West Jackson Boulevard
Chicago Illinois 60604-3590

Subject: EPA's Permitting for Environmental Results (PER) Initiative

Dear Dr. Hedman:

On July 18, 2011, the Department of Natural Resources ("Department") received a letter from your office identifying seventy five questions or concerns with Wisconsin's authority to administer its National Pollutant Discharge Elimination System (NPDES) approved program. The purpose of this letter is to respond to your letter and identify the state's plan for establishing the requisite authority.

I would first like to state that Wisconsin has always been at the forefront in administering the NPDES permit program, and was one of the first 8 states to receive approval for its program. Despite the number of comments from your agency, we believe Wisconsin continues to have one of the top programs in the nation with regard to water quality protection and we intend to maintain a top quality program. Some of the issues raised in your letter are minor technical discrepancies which will have little bearing on administration of the program and no impact on water resources in the state. For some of the other issues, the Department has already initiated the rule making process and will continue to work on those issues.

In response to your concerns and questions, the Department plans to implement the following broad-based approach:

Rulemaking: For some of the issues raised, the Department has already initiated the rulemaking process. Specifically, the Department has already started rules for issue 1 (sanitary sewer overflows), issue 8 (mercury reasonable potential), issue 16 (pretreatment), issue 17 (noncontact cooling water exemption), and issue 71 (mixing zone phase out in Great Lakes). For other issues, the Department may request permission to initiate rule changes. The Department may also seek legislative changes for some of these concerns. Please see the attached chart for details of the Department's proposed actions (see *Attachment A*).

Due to recent statutory changes governing Wisconsin's rulemaking process, it is unlikely that rule changes can be completed in less than two years. The Department will initiate rulemaking as soon as possible and work diligently to move the rules forward, but we estimate that rules will now routinely take two to four years to become law, given the additional steps added to the rulemaking process. The initiation of rule making requires approval from both the Governor's office and Natural Resources Board as well as preparation of an economic impact analysis.

(Page 2 – October 14, 2011)

Statutory Changes: For some of the issues raised, the Department will submit a request for statutory changes. The Department believes it has adequate statutory authority for many of these issues and may also initiate rule changes or seek a statement from the Attorney General's office. Nevertheless, the Department is seeking some legislative changes for clarification purposes and as a direct approach for less complex issues.

Obviously, the Department cannot guarantee that these requested statutory changes will be enacted. The legislature has a number of competing policy issues to address each session, and we anticipate that statutory changes will take at least a year to be completed. If the legislature does not enact the requested changes, the Department may either proceed with rule making based on existing statutory authority or will forward the issue to the Attorney General's office for a statement on the adequacy of existing authority.

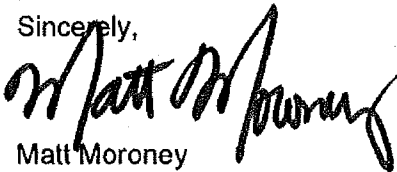
Attorney General's Certification Statement: The Department has requested a statement from the Attorney General's office regarding the Department's existing authority for some of the issues. The request is attached to this letter (see *Attachment B*). The Department has requested a statement by December 15, 2011. The Department may choose to add issues to this request if necessary, as detailed above. If we request additional statements from the Attorney General's office, we will notify you in writing.

Technical Supporting Information and Issues Requiring Further Discussion: For some of the issues, EPA simply requested information from the Department. The Department has provided some technical supporting information in *Attachment C*. For other issues, the Department believes further discussions are required, and Department staff need clarification from EPA staff on those issues (see *Attachments A and C*). This is especially true for storm water program issues because there has been very little discussion on the storm water program during meetings with EPA over the past two years.

Addendum to Memorandum of Agreement (MOA): The Department believes that several issues may be resolved through an addendum to the MOA between EPA Region V and the Department to administer the NPDES program. Potential issues for an addendum are specified in *Attachment C*, along with technical supporting information. If you believe the listed issues are appropriate for an addendum, Department staff would like to work with your staff to draft language for the addendum.

The Department looks forward to continuing to work through all of the issues with your staff in an expedient manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Moroney", is written over the typed name.

Matt Moroney
Deputy Secretary

Attachments

Attachment A

| Issue and State Law | Federal Reg. | Proposed state response | Comments |
|---|------------------|---|--|
| 1. SSOs, Bypass & Diversions- ss. NR 205.07(1)(v) and (2)(d), Wis. Adm. Code | 40 CFR 122.41(m) | Rule change | Rule process already started. Request permission for rule hearings from NRB in early 2012. |
| 2. WQBEL limit duration, intake credits in limit calc, internal waste streams, mass limits, etc Also see issue 20 | 40 CFR 122.45 | Rule or Statutory changes; Technical Issues on 40 CFR 122.45(d) and (e) in Attachment C. | <p>Rules and/or Statutory Changes:</p> <p>40 CFR 122.45 (a) – limits apply to outfall/discharge point – Rule change or Statutory change</p> <p>40 CFR 122.45(b) product based limits - Rule changes</p> <p>40 CFR 122.45(c) limits on metals. Rule revision at a later date (to s. NR 106.06(7)). Since the state water quality criteria are expressed in the total form, expressing limits in the dissolved form would be extremely unusual.</p> <p>40 CFR 122.45 (d) and (e) – expression of limits (daily, monthly, etc.). This issue requires further discussion</p> <p>40 CFR 122.45(f) Mass limitations – permits shall include mass limits with some exceptions. Rule change or statutory change</p> <p>40 CFR 122.45 (g) Pollutants in intake water and adjustment to <u>technology based effluent</u> limitations. Rule change, but low priority.</p> <p>40 CFR 122.45(h) Allowance to impose limits on internal waste stream instead of outfall/discharge</p> |

| | | | |
|---|--|---|--|
| | | | Adjustment to a technology based limit if discharge into wells, land application or POTWs. Rule change or Statutory change. Note: This issue is related to issue 20 . Also, the State does not allow discharges into wells. |
| 3. Process for Interested Persons to request a permit modification and DNR response to those requests. ss. 283.53(2) and 283.63, Wis. Stats. | 40 CFR 124.5(a), (c) and (d). Also must satisfy 40 CFR 122.62 and 122.64 | Rule change or Statutory change | |
| 4. Cooling Water Intake for NEW facilities | 40 CFR part 125, Subpart I | Rule change | |
| 5. Right to Judicial Review s. 227.52, Wis. Stats. | 40 CFR 123.30, CWA sec. 509 (33 USC 1369) | Attorney General (AG) Statement | |
| 6. Thermal Limits and 10 year period of protection from the requirement to meet more restrictive limits are broader than fed exemption. s. 283.17(2), Wis. Stats. | CWA sec. 316(c) (33 USC 1326(c)) | Further discussion with EPA needed or statutory change | |
| 7. NSPS DNR hasn't updated and promulgated NSPS for certain categories of discharges s. 283.19, Wis. Stats., and chs. NR 221-299, Wis. Adm. Code. Also see s. 283.31(3)(d)2, Wis. Stats., and s. NR 220.13, Wis. Adm. Code. | NSPS are established in 40 CFR 400s | AG's Statement as well as rule changes to clarify existing authority | AG's Statement and possible rule change to clarify authority. |

| | | | |
|--|---|---|---|
| 8. Mercury reasonable potential procedures s. NR 106.145, Wis. Adm. Code | | Rule change | Rule making effort already started. WDNR already published a scoping statement to revise its rules. EPA disapproved the state procedures in a letter dated February 17, 2009. Note: WDNR is currently implementing permits in compliance with the federal rules, taking into account the disapproval letter. |
| 9. Chapter NR 219 Analytical test methods – use of solid waste methods | 40 CFR 136.5 | Technical supporting information in Attachment C | A rule change could be made if the agencies can't reach agreement. |
| 10. GLI Procedure 3 TMDL procedures, wasteload allocations (WLA) in absence of TMDL; Procedure 5, pars. D and E. (intake pollutants; Procedure 6, par. D (WET testing) ch. NR 106, Wis. Adm. Code | 40 CFR s. 132.6, Appendix F Procedure 5 and 6 | AG's Statement and Rule changes for consistency | EPA disapproved these rules in November 2000. See 65 Federal Register 66511 and 40 CFR 132.6 The state has already initiated the rule revision process for the procedures involving intake pollutions. Rules promulgation would have to be initiated for the TMDL procedures in the GLI as well as the WET testing reasonable potential procedures. |
| 11. Reasonable potential procedures WQBELS for pollutants other than phosphorus and toxics appear to be missing (general authority under s. 283.31(5), Wis. Stats.) | 40 CFR 122.44(d) | Rules changes to clarify authority | Rule changes. WDNR already has very specific reasonable potential procedures for toxics, thermal and phosphorus, and other specific pollutants. |
| 12. Downstream waters of affected states s. 283.31(1) and (3), Wis. Stats., and ch. NR 106, Wis. Adm. Code | 40 CFR 122.4(d) | AG's Statement | |

| | | | |
|---|--|--|--|
| 13. Authority to include BMPs in permits | 40 CFR 122.44(k) | Supporting information on authority in Attachment C and/or statutory or rule changes. | |
| 14. Rule making – antibacksliding change | 40 CFR 122.44(l) | Rule changes or statutory changes | State has antidegradation procedures which are currently being revised. |
| 15. Compliance schedule language is inconsistent and not broad enough s. NR 106.117, Wis. Adm. Code See also #31 and #32 | 40 CFR 122.47 | Rule changes or statutory changes | |
| 16. Pretreatment rules not consistent with fed revisions in 2005 | 40 CFR 122.21 (j)(6)(ii), 122.44(j)(1), and 122.62(a)(7) | Rule changes | Rule promulgation process was already initiated. EPA states that in some cases, rules are now more stringent than fed rules and less stringent in other areas. |
| 17. Noncontact cooling water exemption s. NR 106.10, Wis. Adm. Code | 40 CFR 132, Appendix F, Procedure 5, pars. D and E; 40 CFR 122.44(d) | Rule change | Rule revision process has already been initiated. |
| 18. Signatories of permit applications or reports s. NR 205.07(1)(g), Wis. Adm. Code | 40 CFR 122.22(a), (b) and (d) | Modify forms and agree to use form in MOA Addendum; Also eventual rule revisions | |

| | | | |
|--|-----------------------|--|--|
| 19. Concentrated aquatic animal production facilities | 40 CFR 122.24 | AG's Statement. Also rule or statutory changes for clarification | DNR has been issuing WPDES permits to concentrated aquatic animal production facilities. |
| 20. Adjustment technology effluent limits on surface water discharge when part of process wastewater is discharged in wells, POTWs or land application – Also see issue 2 | 40 CFR 122.50 | Rule or statutory changes for clarification | Department permit drafters have been adjusting technology based limits as specified in federal rules. Note: State does not allow discharges directly into wells. |
| 21. Content of Fact sheets for Permits ch. NR 201, Wis. Adm. Code, and s. 283.45, Wis. Stats. Related to issue 66 (covers <u>which permits</u> must have fact sheets) | 40 CFR 124.56 | Addendum to MOA and eventual rule changes. See Attachment C | Statutory changes could also be made, along with rule changes. |
| 22. Sending draft permits to agencies and applicant ch. NR 203, Wis. Adm. Code | 40 CFR 124.10 | Addendum to MOA and further discussions needed. See Attachment C. | DNR will agree to notify agencies, interested persons and permittees in an MOU without a rule change, but rule changes can be done as well. Department staff will request more specific information from EPA regarding concerns with the Department's current procedures for notifying other agencies. |
| 23 STORMWATER exemption for certain transportation or road projects are not subject to permits under ch. 283 s. 30.2022(1), Wis. Stats. and s. NR 216.42(5), Wis. Adm. Code | 40 CFR 123.1(g)(1) | Further discussions needed with EPA | This may require a statutory change to s. 30.2022(1) to remove the ch. 283 exemption. |

| | | | |
|---|--|---|--|
| 24 STORMWATER Commerce regulated facilities, other environmental programs, and one-and two-family dwellings, s. NR 216.42(4), (6), and (9), Wis. Adm. Code | 40 CFR 123.1(g)(1) and 123.25(a)(4) | Further discussions needed with EPA | <p>This may require repeal of the provision of 2011 Wisconsin Act 32 that transferred to Department of Safety and Professional Services (DSPS) the regulatory responsibilities for erosion control at commercial building sites to clearly reestablish permitting authority to DNR.</p> <p>Pending further discussion with EPA to resolve this issue, DNR will consider withdrawing its equivalency concurrence mentioned in note under s. NR 216.42(9) and delete the note.</p> <p>Further discussion is needed on s. NR 216.42(6), "Other Environmental Programs."</p> |
| 25. STORMWATER – construction site regulated by local municipal program is deemed covered by state construction site permit and other issues s. NR 216.415, Wis. Adm. Code | 40 CFR 123.22, 40 CFR 123.25-27; 40 CFR 122.28 | Further discussions needed with EPA. | <p>The Authorized Local Program at issue is modeled after the Federal Qualifying Local Program. Further discussion is needed with EPA on the details of how WDNR approved the single ALP currently operating in the state.</p> |
| 26. STORMWATER Exemption for certain MS4 dischargers that are in compliance with an MOU with another state agency s. NR 216.022, Wis. Adm. Code | 40 CFR 123.22, 40 CFR 122.25-27 | Further discussions needed with EPA. | <p>This may require a statutory change to s. 30.2022(1) to remove the ch. 283 exemption.</p> |

| | | | |
|--|---|---|--|
| 27. New Source definition s. 283.19(2)(b), Wis. Stats. | 40 CFR 122.2 | Statutory change | The statute defines a new source as any point source, the construction of which commenced after the applicable effluent limitations or standards of new performance. Need to clarify whether “applicable effluent limit or standards” mean federal standards or when the state has adopted the standard. |
| 28. Acute Limits equal to FAV ss. NR 106.06(3)(b), 106.32(2)(b), 106.87(1) and 102.05(3)(b), Wis. Adm. Code | 40 CFR 122.44(d)(1) (vii)(A) | Further technical discussions or rule change | |
| 29. Solid Waste Leachate and Compliance schedules s. NR 106.13, Wis. Adm. Code | 40 CFR 122.47 | Rule changes | |
| 30. Ammonia Acute Limits are Daily Maximum and federal regulations require a 7 day average and average monthly limit s. NR 106.32(2)(a), Wis. Adm. Code | 40 CFR 122.45(d) | Information provided –Attachment C | Further discussion may be needed |
| 31. Compliance schedule language provisions for Ammonia ss. NR 106.32(2)(b)2., 106.32(3)(a)4.a, and 106.37(2), Wis. Adm. Code. Related to issue # 15 | 40 CFR 122.47 | Rule Change | |
| 32. Compliance schedule language for Tier 2 values s. NR 106.07(8), Wis. Adm. Code. Related to issue #15 | 40 CFR 122.47 and 40 CFR 132, Appendix F, Procedure 9 | Rule Change | Narrow tier II value provision in compliance schedule language (s. NR 106.07(8)) to Great Lakes dischargers. |

| | | | |
|--|--|--|---|
| 33. Real Time Data for effluent limitations ss. NR 106.32(3)(c)(2) and 106.32(4)(d), Wis. Adm. Code | Question posed by EPA | Technical information provided in Attachment C | Question from EPA: Does Wisconsin have permits that have limits based on real time data? If so, how is compliance measured? |
| 34. Time period for expression of limits - Ammonia s. NR 106.32(5)(c), Wis. Adm. Code See #30 and same response to EPA | 40 CFR 122.45(d) | Technical information provided in Attachment C. | Further discussion may be needed. |
| 35. Ammonia Reasonable Potential Provision s. NR 106.33(2), Wis. Adm. Code | 40 CFR 122.44(d) | Rule change | EPA comment is related to the provision that states that WDNR may not impose a WQBEL for ammonia if the calculated WQBEL is greater than 20 mg/L in the summer or 40 mg/L in the winter |
| 36. Ammonia: exclusion from antidegradation procedures if ammonia limit increases due to changed criterion s. NR 106.34(2), Wis. Adm. Code | 40 CFR 122.44(d); CWA sec. 301(b)(1)(C) (33 USC 1311(b)(1)(C)) | Rule change | |
| 37. Ammonia – allows compliance schedules greater than 5 years for variance based limits s. NR 106.37(1), Wis. Adm. Code | 40 CFR 122.7 | Rule revision | |
| 38. Ammonia variances. Every variance requires EPA approval, including those for stabilization ponds s. NR 106.38, Wis. Adm. Code, and s. 283.15, Wis. Stats. | | Addendum to MOA and possible rule or statutory change | DNR can agree in writing to submit all variances to EPA |

| | | | |
|--|--|---|---|
| 39 Chloride variances require EPA approval s. NR 106.83(2), Wis. Adm. Code, and s. 283.15, Wis. Stats. | | Addendum to MOA and possible statutory or rule change | DNR can agree in writing to submit all variances to EPA |
| 40. Chloride Reasonable Potential language and compliance schedule ss. NR 106.88(1) and 106.85, Wis. Adm. Code | 40 CFR 122.44(d) and 122.47 | Rule revision | |
| 41. Chloride limits – expression of time periods See #30 and #34 s. NR 106.88(4), Wis. Adm. Code | 40 CFR 122.45(d) | Technical Information provided in Attachment C | Further discussions may be needed. |
| 42. Chloride WET limits s. NR 106.89(2) and(3), Wis. Adm. Code | 40 CFR 122.44(d)(1)(v), 122.44(d)(1)(ii) and CWA s. 301(b)(1)(C) | Rule revision | |
| 43. Chloride – exemption from WQBEL calculation s. NR 106.91, Wis. Adm. Code | 40 CFR 122.44(d) and CWA s. 301(b)(1)(C) | Rule revision | |
| 44. Point source definition and pollutant definition in code s. NR 205.03(27) and (28), Wis. Adm. Code | 40 CFR 122.2 | AG's Statement or Statutory or Rule change for clarification | |
| 45. Permit not a property interest, permit as a shield | 40 CFR 122.5 | Statutory change or rule change | |

| | | | |
|---|---------------------------|--|--|
| 46. Expedited variance procedures or time extensions for variance requests to technology based limitations and to 316(b) intake requirements | 40 CFR 122.21(o) | Rule revision | |
| 47. Signatory to a permit s. NR 205.07(1)(g), Wis. Adm. Code | 40 CFR 122.22 | Rule Revision | |
| 48. Termination of permits | 40 CFR 122.41(a) | Rule Change or Statutory change for clarification | |
| 49. Standard Permit Conditions notification of changes s. NR 205.07(1)(q)1, Wis. Adm. Code | 40 CFR 122.41(l)(1)(i) | Further discussions with EPA staff needed or rule revisions for clarification | |
| 50. Termination – notice of intent to terminate after opportunity for hearing s. 283.53(2)(a), Wis. Stats. See also issues 3 and 48 | 40 CFR 124.5(a)-(d) | Rule change or Statutory change | |
| 51. Public Informational hearing requests | 40 CFR 124.11 | AG's Statement | |
| 52. Stormwater – exclusion of rail lines and access roads s. NR 216.21(2)(b), Wis. Adm. Code | 40 CFR 122.26(b)(14) | Addendum to MOA | WDNR will stipulate that the exclusion only applies to access roads and rail lines not owned or operated by the permittee. |

| | | | |
|--|--|--|--|
| 53. Stormwater – submittal of latitude and longitude for no exposure s. NR 216.21(3)(e)2., Wis. Adm. Code | 40 CFR 122.26(g)(4)(i) | Change to NEC Form | WDNR can agree to change the NEC form to request this information. An eventual rule change can articulate the requirement. |
| 54 Stormwater disturbances of less than 1 acre that are part of a common plan of development that disturbs more than one acre ss. NR 216.42(1) 216.002(2), Wis. Adm. Code | 40 CFR 122.26(b)(15)(i) | Further discussions with EPA staff needed | The definition of “common plan of development” in NR 216 is consistent with the federal use of the term in its definitions. |
| 55. Stormwater - illicit discharges definition s. NR 216.07(3), Wis. Adm. Code | 40 CFR 122.26(b)(2) and 122.34(b)(iii) | Further discussions with EPA needed | The language at issue deals with discharges that do not require coverage under a WPDES wastewater permit, which by definition are not illicit. WDNR will adopt a rule change if necessary, but further discussion on this issue is needed. |
| 56. Stormwater annual report and reliance on municipalities for submittal s. NR 216.07(8), Wis. Adm. Code | 40 CFR 122.34(g)(3)(v) | Add to annual report or rule change | WDNR will add this to the annual report with an eventual change to NR 216 to emulate EPA language if necessary. |
| 57. Annual report – changes to management program s. NR 216.07, Wis. Adm. Code | 40 CFR 122.42(c)(2) | Add to annual report or rule change | WDNR will add this to the annual report with an eventual change to NR 216 to emulate EPA language if necessary. |
| 58. Waters of the state – does it include mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows or playa lakes? s. NR 205.03(44), Wis. Adm. Code | 40 CFR 122.2 | AG’s Statement | |

| | | | |
|---|-------------------------------------|--|---|
| 59. Disposal of solid wastes at a site licensed under NR 500 to 536 s. NR 200.02(3)(e), Wis. Adm. Code | 40 CFR 122.3 | AG's Statement | NOTE: EPA's citation to state regulations in the letter is incorrect on this issue. |
| 60. Discharges from private alcohol fuel production system to land are exempt from a permit s. NR 200.03 (3)(g), Wis. Adm. Code and s. 283.61, Wis. Stats. | | AG's statement | NOTE: EPA's citation to state regulations in the letter is incorrect. |
| 61. Permit application requirements missing for existing manufacturing, mining, etc discharger, aquatic animal production facilities, new sources and new discharges | 40 CFR 122.21(g), (i), (k), and (r) | Explanation of existing rule authority on permit applications in Attachment C | Note: Could also revise rules in chapter NR 200 to clarify authority |
| 62. Suspension of permits. Also see issue 50 | 40 CFR 122.41(f) | Rule revision and Addendum to MOA | Rule revision and perhaps an addendum to MOA that states WDNR will not suspend any permits. |
| 63. False statements – multiple penalties for multiple false statements | 40 CFR 123.27 | AG's statement | |
| 64. Public participation in enforcement process | 40 CFR 123.27(d) | AG's statement | |
| 65. Preparation of draft permit following complete permit application | 40 CFR 124.6 | Addendum to MOA or eventual rule change | |

| | | | |
|--|---------------------------------------|---|---|
| 66. Fact sheets for every NPDES permit facility (surface water discharger) s. 283.45, Wis. Stats. Related to issue 21 (issue 21 covers the <u>content</u> of fact sheets) | 40 CFR ss. 124.8 and 124.56 | Addendum to MOA and eventual rule changes. See Attachment C. | Statutory changes could also be made |
| 67. Stormwater – small MS4s lack: stormwater management program evaluation and records must be available to public | 40 CFR 122.34(g)(1) | Further discussion is needed; Add to annual report | WDNR will add program management and assessment to the annual report with an eventual change to NR 216 to emulate EPA language if necessary. Wisconsin has a public records law that is set forth in ch. 19 of the Wisconsin Statutes. NR 216 language needs not separately address public records. |
| 68. Date when effluent limitation are established s. 283.13(2)(f), Wis. Stats. | 33 USC 1311(b)(2)(F) | Further discussion or Statutory change | Statutory change could be made but doesn't seem necessary to comply with CWA because the dates have long passed. |
| 69. Ch. 283 Wis. Stats – state can waive compliance with any requirement in ch. 283 to prevent an emergency threatening public health, safety or welfare. This exemption is not allowed under federal law | | Further discussion with EPA needed | |
| 70. Permittee may request alternative limits s. NR 106.05(8), Wis. Adm. Code | 40 CFR 122.44(d) and CWA 301(b)(1)(C) | Rule revision | |
| 71. Mixing zone phaseout in Great Lakes s. NR 106.06(2), Wis. Adm. Code | 40 CFR 132 | Rule revision | Rule changes already started. |

| | | | |
|---|--|--|---|
| 72. Dilution/Mixing zone allowed with receiving water ss. NR 106.06(4)(c)5., 8. and 10. and 102.05(3), Wis. Adm. Code | 40 CFR 122.44(d) and CWA sec. 301(b)(1)(C) | Technical justification provided in Attachment C | |
| 73. Mixing zones – allow time in comp schedules for mixing zone demonstrations. s. NR 106.06(4)(c)5. and 10., Wis. Adm. Code | 40 CFR 122.47 | Technical Justification provided in Attachment C or MOA Addendum if necessary | Information/demonstration by the permittee is done before the permit is reissued. |
| 74. WET testing ss. NR 106.08 and 106.09, Wis. Adm. Code | 40 CFR 122.44(d) | Rule revisions | |
| 75. Permitting and enforcement authority for WPDES permit program 2011 WISCONSIN ACT 21 (sec. 227.10(2m), Wis. Stats.) | 40 CFR 123.25 and 123.27 | AG's Statement | |

ATTACHMENT C

TECHNICAL SUPPORTING INFORMATION & ISSUES REQUIRING FURTHER DISCUSSION

Issue 2: Expression of Limits under 40 CFR 122.45(d) and (e): In a number of items (issues 2, 30, 34 and 41), EPA has alleged that Wisconsin provisions are not consistent with 40 CFR 122.45(d) and (e) with respect to averaging periods for effluent limitations. Wisconsin suggests the need for further discussion on this issue. However, the Department's general response to EPA's stated position is as follows:

- Wisconsin accepts that, for consistency purposes, 122.45(d) and (e) should apply for imposing technology based effluent limits.
- In regulations that protect water quality, Wisconsin rules specify effluent limitations with averaging periods that are consistent with a pollutant's impact in the water environment. To do otherwise would be to not provide the appropriate level of water quality protection. Therefore, as a matter of course, expressing all effluent limits according to ss. 122.45(d) (1) and (2) is arbitrary and impracticable.
- EPA has suggested during some discussions that Wisconsin make the impracticability demonstration on a permit by permit basis. This would be an unwarranted and redundant burden.
- Wisconsin suggests that EPA modify 122.45 so that this prescriptive provision does not pertain to water quality based effluent limitations.

Issue 9 Solid Waste Test methods: SW 846 methods have been referenced in ch. NR 219 for over 15 years. EPA Region 5 was aware we were doing this and accepted it until now. When this issue has been raised by the EPA at several Wisconsin wastewater facilities in the past it has always been resolved with EPA Region 5 acceptance of the use of SW 846 methods. The rationale behind using SW 846 methods is that they are equivalent or in most cases, better than the 600 series EPA method counterparts. SW 846 methods represent state-of-the-art technology that is actually being used in laboratories. In addition, the quality control criteria in SW 846 methods are significantly more rigorous than in the older EPA methods. SW 846 methods were created using the 600 series methods as a starting point and are continuously updated unlike the 600 series methods. The 600 series methods are less sophisticated, out of date, and require less quality control than SW 846 methods.

As a result, there is no advantage to the data users (WI DNR or EPA) in forcing their use when better options are available. We offer SW 846 methods as alternatives. We do not require their use instead of using the 600 series methods but do allow both. It makes sense for laboratories to be able to cite and adopt only one method that can be used to analyze several matrices instead of multiple methods. This increased flexibility of multiple methods benefits the data users, laboratories, and treatment plants. Most importantly, we have been accepting wastewater compliance data generated with SW 846 methods for more than a decade and we haven't experienced any adverse effects from doing so. To go backwards now and exclude the SW 846 methods in our systems

and for our users would be a significant burden to satisfy a logistical requirement that results in no noticeable improvement in data quality. In fact, most labs would just change their citations to match what EPA wants and this will not improve data quality and will in fact encourage labs to follow less stringent requirements in the 600 series. The labs would likely have to report data under "modified" 600 series citation because using newer technology they could not really follow the 600 series methods as they stand today.

Instead of requiring the use of outdated methods, the Department requests that a Memorandum of Understanding (MOU) be established between the WI DNR and EPA Region 5 that allows the Department to continue to accept data generated with SW 846 methods. Also see attached letter from 1997 to USEPA regarding this issue.

Issue 13 Best Management Practices (BMPs): The Department may seek statutory or rule changes to clarify its authority to include best management practices in a WPDES permit, however, the Department believes it already has the authority to require bmps for all point sources (in addition to the requirements in chs. NR 216 and NR 243) under the authority of Wis. Stat. § 283.31(3) and (4) and NR § 102.05(2), Wis. Adm. Code. Also note that definition of "effluent limitation" in Wis. Stat. § 283.01(6) is very broad and includes any restriction (which could include a management practice) that limits the quantity or rate of pollutant discharged.

Issue 21, 22 and 66 Fact Sheets and Distribution of Draft Permits to Other Agencies: The Department can agree in an Addendum to the Memorandum of Agreement (MOA) with EPA to include all of the items in the fact sheets that are required in s. 40 CFR 124.56 and 124.8. The Department will also seek changes to state statutes or rules, but these requirements can be immediately implemented through an Addendum to the MOA.

The Department believes it does provide notice consistent with the requirements in 40 CFR s. 124.10(c) and does not completely understand what EPA's concerns are with the Department's notice procedures. After further discussions, if EPA believes there are deficiencies in the way the Department provides notice of draft permits to other agencies, the Department can agree to cure those deficiencies through an Addendum to the MOA.

Issue 30 and 34 Expression of Ammonia Limits: The acute limit for ammonia is based on effluent pH. Chronic limits (monthly/weekly) are based on stream pH, temperature and flow. The two types of limits are not interchangeable. It is therefore not practicable to express the acute (daily limit) as monthly/weekly limits. If necessary, Department staff can further discuss this issue with your staff. Also, please refer to the response to issue 2 above.

Issue 33 Real Time Data: For issue 33, EPA asked for information regarding use of real time data in Wis. Adm. Code NR §§ 106.032(3)(c)(2) and 106.32(4)(d). Here are two examples and a brief description regarding how compliance is measured:

1. Appleton WWTF (0023221)

CBOD limits are listed in a grid based on river flow and temperature.

Compliance is measured when Appleton reports the appropriate CBOD limit from the grid on the DMR and also reports their effluent CBOD value for that day. (River flow and temperature are also reported on the DMR.)

SWAMP has the capability to compare the effluent CBOD value to the reported CBOD limit and determine compliance. Exceedances are automatically flagged by SWAMP.

2. Eau Claire WWTF (0023850)

Ammonia limits are listed in a grid based on effluent pH.

Compliance is measured when Eau Claire reports the appropriate Ammonia limit from the grid on the DMR and also reports their effluent Ammonia value for that day. (Effluent pH is also reported on the DMR.)

SWAMP has the capability to compare the effluent ammonia value to the reported limit and determine compliance. Exceedances are automatically flagged by SWAMP

If you need additional information on this issue, please contact Tom Mugan at 608-266-7420 or Mike Lemcke at 608-266-2666 in the Bureau of Water Quality.

Issue 41 Expression of Chloride Limitations: Chloride is controlled through minimization of sources and is not removed through wastewater treatment. For chloride limitations, it is not practicable to use multipliers for expressing limits that are based on standard removal for conventional treatment. If necessary, Department staff can further discuss this issue with your staff. Also, please see issue 2 above.

Issue 61 Permit Application Information:

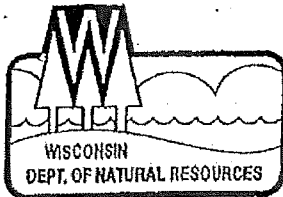
The Department has broad authority in ss. NR 200.07 and 200.09, Wis. Adm. Code, to require information from permittees. Note that s. NR 200.07(1), Wis. Adm. Code, states that the Department may prescribe application forms prepared by EPA for use in Wisconsin. Therefore the Department believes it has existing authority to require the information listed in issue 61.

Issue #72 Value of Qs in Limit Calculation Procedure

Section NR 106.06(4) (c) 5., 8., and 10. specify values of Qs to be used in the mass balance equation in NR 106.06 (4) (b) 1. However, note that if the receiving stream is impaired (background concentration, Cs, exceeds the criterion for a pollutant) applying the equation results in a negative (less than zero) dilutional capacity. That translates to the limitation be set equal to the criterion (if well water is the water supply source) or up to the background concentration (if 100% of the water supply is from intake water from the same water body). Also see NR 106.06(6).

Issue #73 Mixing Zone Demonstration

If WDNR provides time for a permittee to make a mixing zone demonstration under NR 106.06(4) (c) 5. and 10, this time is provided prior to permit issuance or reissuance.



ATTACHMENT C
State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Tommy G. Thompson, Governor
George E. Moyer, Secretary

Box 7921
101 South Webster Street
Madison, Wisconsin 53707-7921
TELEPHONE 608-266-2621
FAX 608-267-3579
TDD 608-267-8897

October 14, 1997

Mr. Dennis Wesolowski
USEPA Region 5
77 West Jackson
Chicago, IL 60604

SUBJECT: Use of SW-846 Methods for Wastewater Samples

Dear Mr. Wesolowski:

This letter serves to give you some background about Wisconsin's decision to incorporate SW-846 methods into NR 219, the state's equivalent to 40 CFR 136. When Wisconsin proposed this rule change, we sent the Region a copy of the rule package and our MDL Guidance Document. The background memo summarizes our rationale for the change as follows:

The SW-846 methods are technically equivalent to the approved wastewater methods listed in NR 219. Many SW-846 methods utilize newer, more sensitive technologies than existing methods. The addition of the solid waste methods will consolidate the number of references needed by laboratories certified under NR 149, and will ensure accurate reporting of the methodology being used by registered and certified laboratories.

The background memo notes that the federal regulations do not include the SW-846 methods in 40 CFR Part 136; however, we assert

This move, while technically approving more methods than the federal regulations, conforms to the [statutory] provision allowing the Department to set more stringent requirements. The SW-846 methods include stricter quality control requirements for some analytes and utilize more sensitive technologies than the currently approved methods.

As we are all painfully aware, most of the organics methods in the 600 series date back to the 1984 Federal Register and inorganics methods are even older. In the first edition of SW-846, the organics methods in the 600 series were rewritten in a modular format to accommodate matrices other than water. These methods cite 40 CFR Part 136 in their references and in some cases, the parallel 600 series method validation study. Because SW-846 uses a modular format, our rule had to reference multiple methods to assure complete procedural citations. Table C in NR 219 lists the determinative procedure in the body of the table. Preparatory procedures are listed in footnote 12 to the table as well as in determinative procedures in SW-846. For example, volatile organics method 8021 references purge and trap method 5030A and gas chromatography method 8000A.

EPA organics methods in the 600 series include a flexibility provision in paragraph 8.1.2 that reads as follows:

In recognition of advances that are occurring in chromatography, the analyst is permitted certain options (detailed in Sections 10.4, 11.1, and 12.1) to improve the separations or lower the cost of measurements. Each time such a modification is made to the method, the analyst is required to repeat the procedure in Section 8.2.*

* Volatile organics methods reference a single section that addresses method conditions, detectors, and column selection. Semi-volatile methods reference additional sections that address sample concentration and cleanup procedures.

Quality Natural Resources Management
Through Excellent Customer Service



By insisting that laboratories continue to cite the 600 series methods, we are actually increasing the cost of analysis without changing how samples are analyzed or the quality of the data. Commercial laboratories must maintain two different labels for the same analysis, a system that is subject to miscommunication and error. We believe that this is an unnecessary regulatory burden that also increases the cost to our agency. When our wastewater compliance staff received results that reference SW-846 methods, they then had to spend extra time determining whether the analysis was appropriate. They often contacted the facility who contacted their analytical laboratory which then resulted in a reissued report that simply changed the method reference. Alternatively, the compliance staff directed their questions to quality assurance staff who then must spend time addressing the problem. By acknowledging that the methods are indeed equivalent, we eliminated these unnecessary costs. We believe that it is in the best interest of data quality to know how samples were analyzed so footnote 14 to Table C in NR 219 specifies that laboratories can only reference packed column methodology from SW-846 when they actually employ that technology.

Method Comparisons - High Points

In essence, the flexibility statement in paragraph 8.1.2 allows laboratories to modify the 600 series method conditions to be consistent with the parallel methods in SW-846. The primary modification laboratories make is to specify capillary columns with method conditions appropriate for them. EPA issued letters stating that substituting capillary columns for packed ones is allowable, that the PID and Hall detectors can be configured in series, and that the purge time for aromatic volatile can be reduced to 11 minutes so aromatic and halogenated VOCs can be analyzed in a single determination. When modifications are made, both sets of methods require that laboratories demonstrate their ability to generate acceptable accuracy and precision before analyzing samples. Performance criteria in the SW-846 methods were taken directly from the parallel 600 series methods for all but the two VOC methods: 8021 and 8260. These two methods were taken from the parallel 500 series drinking water methods and have tighter acceptance criteria than BPA methods 601, 602 and 624.

The move to capillary columns and enhanced computer data stations has significantly improved chromatographic separations as well as precision, bias, and sensitivity attributable to the chromatography system. Revisions to SW-846 methodologies reflect this. This is most evident in the calibration verification criteria for VOCs (15% for GC and 20% for GC/MS determinations). By contrast, VOC methods in the 600 series methods reference tables of QA Acceptance Criteria which establish compound-specific limits that are broader than 15%. Acceptance limits ranging from 40 - 160% are not uncommon.

The organics methods (601 through 625) typically require a minimum of a 3-point calibration as compared to SW-846 methods that characterize curves with 5-point calibrations. To quantify using average response factor in the GC/MS procedures, methods 624 and 625 allow RSDs up to 35%. Methods 8260A and 8270B specify RSDs of less than 15% and 20% respectively. As an alternative to using average response factor, both sets of methods allow use of a calibration curve but neither specify a linear fit. Methods 625 and 8270B both establish acceptance criteria for calibration verification of 20%. Because the SW-846 methods include a large number of analytes, these methods use calibration check compounds (CCCs) for verification but then emphasizes that if the CCCs are not required analytes by the permit, then all required analytes must meet the 20% drift criterion.

One of the issues that is typically raised when comparing the wastewater and solid waste methods is that there are differences in quality control requirements. To determine the significance of this argument, we looked at a sampling of methods listed in 40 CFR Part 136.

Inorganics and Metals

We note that most inorganic and metals methods contain vague directions about calibration and do not include requirements for processing duplicates and spikes. Notable exceptions are BPA methods 200.7 and 300.0 which were written for use in multiple matrices. *Standard Methods for the Examination of Water and Wastewater* includes an introductory chapter and each major section begins with quality control considerations; however, individual methods do not consistently include or reference quality control requirements.

Organics

Both the 600 series and SW-846 require analysis of method blanks and matrix spikes. For GC determinations (methods 601 - 612), the specified frequency for matrix spikes is 10% with a minimum of one sample per month. GC/MS methods 624 and 625 specify a 5% frequency. Matrix spike recoveries are compared to the QC acceptance criteria in Table 1 or 6. These methods do not require on-going monitoring of precision. SW-846 bases its QC frequency on an analytical batch, specifying matrix spike duplicates for each batch of samples (see method 8000A). It also sets the same minimum requirement of one spiked sample per month for laboratories analyzing one to ten samples per month. As typically implemented, this means that laboratories analyze matrix spike duplicates each day samples are analyzed. Laboratories are instructed to calculate statistical control limits for each matrix and to compare them to the QC acceptance criteria table in the methods. Because laboratories are using capillary columns and more stringent calibration acceptance criteria, resulting matrix control limits are typically tighter than the QC acceptance criteria for the 600 series methods. If a laboratory's control limits are out of line, we address this during the certification compliance audit.

In summary, we believe that SW-846 method conditions are equivalent or superior to those in 40 CFR Part 136. The more stringent quality control in these methods yields higher quality data. Our laboratory certification program covers wastewater, solid waste, and drinking water methods so we are in an excellent position to compare and evaluate the merits of the various methodologies. We establish minimum requirements for quality control in NR 149.14, Wisconsin Administrative Code. In addition, we require compliance data to come from certified or registered laboratories (NR 219.06). Our laboratory certification program provides the added benefit of verifying compliance with Code and method requirements. By including SW-846 methods in our state's wastewater rules, the wastewater program can obtain higher quality data and laboratories are no longer out of compliance for mislabeling their methodology. We echo the sentiments we heard during the public comment period: Inclusion of the SW-846 methods in the wastewater rules was long overdue. In light of BPA's commitment to implementing performance-based measurement systems, we are surprised that BPA has not advised a similar action. We are sure that as you review this letter and the methods in question, you will share this belief.

Sincerely,

Donalea Dinsmore

Donalea Dinsmore
Quality Assurance Chemist

Robert H. Weber

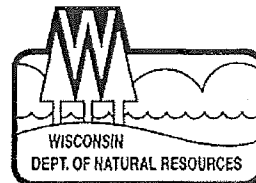
Robert H. Weber
Chief, Discharge Permits Coordination Program

cc: Tom Muga, WM/2
John R. Sullivan, SS/6
Alfredo Sotomayor, SS/6

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

ATTACHMENT B

Scott Walker, Governor
Cathy Stepp, Secretary
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711



October 14, 2011

The Honorable J.B. Van Hollen
Attorney General
Department of Justice
Room 114 East State Capitol
Madison Wisconsin 53702

Subject: Attorney General's Statement Regarding Authority to Administer NPDES Permit program

Dear Attorney General Van Hollen:

Over the past several years the U.S. Environmental Protection Agency (EPA) has been reviewing the statutory and regulatory authority of state agencies that have approved National Pollutant Discharge Elimination System (NPDES) programs. EPA has conducted this review as part of its Permitting for Environmental Results (PER) initiative to determine whether each state has adequate statutory and regulatory authority to administer the program.

Recently, EPA completed its review of Wisconsin's program and sent the Department of Natural Resources ("Department") a letter identifying seventy five questions or concerns with Wisconsin's authority to administer the program (See Attachment). In the letter, EPA has asked the Department to either seek statutory or regulatory changes that will establish the requisite authority, or provide a statement from the Attorney General's office that specifically identifies existing authority for the listed question or concern. Pursuant to 40 CFR s. 123.23 and 123.62, a statement from the Attorney General's office is required for program administration and for significant revisions to state programs.

Department staff have conducted a preliminary review of the issues and recommended several different courses of action. For some of the issues, the rule promulgation process has already started and EPA's concerns can be addressed through those efforts. For other issues, staff have either suggested revisions to existing rules or statutes, or staff have proposed to address the concern through supporting data or explanation. For some of the issues, the Department believes it is appropriate to seek an Attorney General's statement at this time. Those issues are as follows:

Issue # 5 Right to Judicial Review. Is the opportunity to seek judicial review (pursuant to Wis. Stat. s. 227.52) of the final approval or denial of a WPDES permit equivalent to the opportunity to seek judicial review under 40 CFR s. 123.30 and CWA s. 509, 33 USC s. 1369? EPA has identified specific questions with regard to the ability to seek judicial review under state law, including whether Wisconsin's statute, which provides that judicial review is available to persons whose "substantial interests" are "adversely affected" by the decision, is consistent with the federal requirements for judicial review. In your response, please also address the issue of whether any individual person may directly seek judicial review of the state's permit decision, or whether seeking review under s. 283.63, Stats., is a prerequisite for an individual (other than the applicant) to seek review of the decision. [Note: Please consider the following case: *Sewerage Commission vs. DNR* 102 Wis.2d 613, 424 N.W. 2d 685 (1988) in your statement.]

Issue # 7 NSPS. Pursuant to Wis. Stat. § 283.31(3)(d) 2. and s. NR 220.13, Wis. Adm. Code, the Department believes it has existing authority to include limitations based on federal NSPS in permits even if the Department has not yet promulgated new or revised rules for the NSPS in the administrative code. Please provide a statement regarding the Department's authority as requested in issue 7.

Issue # 10 GLI Procedures. For one of the procedures (intake credits in determining reasonable potential) identified in issue 10, the Department has already initiated rule making. For the other two procedures (TMDLS and WLAs in absence of TMDLs and Whole Effluent Toxicity (WET) reasonable potential), the state may submit a request to initiate the rule making process. Although the state already has initiated or may initiate rule changes to implement these procedures, the Department believes that the state already has statutory authority to administer these procedures in WPDES permits. Based on the authority in Wis. Stat. § 283.31, the state is required to comply with these requirements because they are applicable to Wisconsin waters. EPA disapproved the Department's rules and specifically promulgated these procedures for Wisconsin for discharges of toxic substances to the Great Lakes Basin (see 40 CFR s. 132.6). The Department's opinion is that its interpretation is consistent with the Wisconsin Supreme Court's decision in the *Andersen* case (see request for statement on *Andersen* case below). Please provide a statement as to whether you concur with this interpretation.

Issue # 12 Downstream Waters. Does the Department have authority to impose permit conditions to assure compliance with the applicable water quality requirements of all affected states (includes tribes) pursuant to Wis. Stats. ss. 283.13(5) and 283.31? See also subchapter II of ch. NR 104, ss. NR 203.03(4)(c) and (g), 203.13(3), 106.06(1)(b), 106.32(1)(b), 106.55(9), 106.56(9), 210.05(3)(f) and (4) and 210.06(3)(g), Wis. Adm. Code, as well as Wis. Stats. s. 283.41(1) and (2). The Department believes it has the authority to impose limitations to include conditions based on affected downstream waters of other states, including tribes.

Issue # 19 and #44 Concentrated Aquatic Animal Production facilities and the definitions of point source and pollutant. The Department has issued WPDES permits to fish hatcheries that meet the definition of a concentrated aquatic animal production facility in the state. The Department believes it has the authority to issue permits to concentrated aquatic animal production facilities pursuant to Wis. Stat. ss. 283.01(12) and (13) and 283.31. Also, section NR 220.02(20), Wis. Adm. Code, includes fish hatcheries as a category of point sources. The Department also believes that the definitions of "discharge" and "point source" in Wis. Stat. s. 283.01 (5) and (12) are broad enough to require permits for discharges from landfill leachate collection systems to waters of the state, and the definition of pollutant in Wis. Stat. s. 283.01(13) is broad enough to cover discharges of filter backwash from a point source. Please provide a statement to address EPA's concerns.

Issue # 51 Request for an Informational Hearing 40 CFR 124.11 and 124.12 provide that a public informational hearing must be held if the agency finds there is significant public interest in the draft permit. Wisconsin law, in s. NR 203.10(5) and Wis. Stat., s. 283.49, similarly provides that the Department shall hold a public hearing on a permit application if the Department deems that there is a significant public interest in holding such a hearing. Wisconsin law also provides that the Department shall hold a public hearing on the petition of 5 or more persons. Please provide your opinion as to whether Wisconsin law is consistent with these federal requirements.

Issue # 58 Waters of the State Definition. Is Wisconsin's definition of "waters of the state" in s. NR 205.03(44), Wis. Adm. Code, and ch. 283, Stats., which includes all lakes, bays, streams, water courses and other surface or groundwater, natural or artificial, public or private, broad enough to include mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, and playa lakes, as included in the definition of "waters of the United States" in 40 CFR s. 122.2?

Issue # 59 Exemption for Disposal of Solid Waste to a Landfill – s. NR 200.03(3)(f), Wis. Adm. Code. EPA has raised the issue of whether the exemption from a permit application for disposal of solid waste into a solid waste facility regulated under chs. NR 500 to 536 is consistent with federal law. The Department believes the exemption is consistent with federal law because the placement of pollutants into a licensed landfill does not

require an NPDES permit under federal law because it is not a discharge to surface waters. Note, however, that the definition of "solid waste" in Wis. Stat. s. 289.01(33) states that the term "solid waste" does not include the disposal or discharge of materials which are considered "point sources" under chapter 283. So if there was a discharge of landfill material to surface waters, the discharge of materials from the landfill to the surface water would require a WPDES permit.

Issue # 60 Exemption for Discharges from Private Alcohol Fuel Production Systems in Wis. Stat. s. 283.61, Stats. EPA has asked for clarification regarding the scope of the exemption in Wis. Stat. s. 283.61. The exemption only applies if the discharge or disposal is confined to the owner's property and is disposed using an environmentally safe land spreading technique. The Department's opinion is that the exemption does not apply to discharges from private alcohol fuel production systems that reach waters of the United States because those discharges would not be completely confined to the owner's property and would travel offsite. Does your Office agree with this interpretation?

Issue # 63 False Statements. Does the state under either state statutes or rules have the authority to assess multiple penalties for multiple instances of knowingly making false statements? In other words, can the state seek a penalty for each false statement made? Note that s. 281.98(1), Wis. Stats., provides that any violation is subject to penalties and each day of continued violation is a separate offense. Please advise whether this is consistent with the federal rule, 40 CFR 123.27.

Issue # 64 Public Participation in Enforcement Process. Does the state provide for public participation in the state enforcement process consistent with 40 CFR 123.27(d)?


Issue # 75 Wis. Stat. s. 227.10(2m). EPA has requested a statement from your office explaining the relationship between the limitation in s. 227.10(2m), and the enforcement provisions set forth in Wis. Stat. ch. 283. Taking into account the recent enactment of s. 227.10(2m), Stats., does the state still have adequate permitting and enforcement authority required pursuant to 40 CFR 123.25 and 123.27?

Andersen v. Department of Natural Resources, 332 Wis. 2d 41, 796 N.W. 2d 1 (2011) EPA referred to the *Andersen* decision in its letter and stated that, in light of the *Andersen* decision, it is requesting that Wisconsin quickly seek corrections to its state authority. The Department believes the holding in the *Andersen* decision was fairly narrow. The case upheld the Department's interpretation of one specific statutory provision in chapter 283, Stats, and limited the scope of issues for contested case hearings. A statement from your office regarding the primary holdings in the case would be helpful.

The Department requests a written statement by December 15, 2011. Please be advised that this is the Department's initial request for a statement from your office in response to EPA's request. The Department may request an additional statement from your office on additional issues if the Department is unable to resolve other issues through discussions with EPA or through clarifying statutory or rule changes.

If you have any questions regarding the issues listed above or if you have questions regarding the Department's WPDES permit program, please contact the lead program attorney, Robin Nyffeler, at (608)266-0024.

Sincerely,


Matt Moroney
Deputy Secretary

CC: Robin Nyffeler, Judy Ohm, Jane Landretti – LS/8
Ken Johnson – AD/8; Russ Rasmussen – AD/8; Tom Mugan – WT/3



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

January 19, 2012

Matt Moroney, Deputy Secretary
Wisconsin Department of Natural Resources
101 S. Webster Street
P.O. Box 7921
Madison, Wisconsin 53707-7921

Re: Attorney General's Statement Regarding Authority to Administer NPDES
Permit Program

Dear Mr. Moroney:

In your letter of October 14, 2011, you indicate that the U.S. Environmental Protection Agency (EPA) has been reviewing the authority of state agencies for their EPA-approved National Pollutant Discharge Elimination System (NPDES) programs under the federal Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 et seq. You state EPA recently completed its review of Wisconsin's WPDES program and sent the Department of Natural Resources ("Department" or "DNR") a letter identifying seventy-five questions or concerns with Wisconsin's authority to administer the program. You indicate that several of those issues are being addressed by DNR, but for some of the issues, the Department believes it is appropriate to seek an Attorney General's statement at this time.

The following is my response to the issues presented in your letter dated October 14, 2011.

Issue # 5 Right to Judicial Review.

1. Is the opportunity to seek judicial review of the final approval or denial of a WPDES permit equivalent to the opportunity to seek judicial review under 40 CFR § 123.30 and CWA § 509?

Response. In my view the answer is yes. CWA § 509(b)(1)(F) [33 U.S.C. § 1369(b)(1)(F)] allows any interested person to seek judicial review of an EPA permit decision. Wisconsin Stat. § 227.52 requires that the decision "adversely affect the substantial interests of any person." The federal and state case law establish that these two standards are effectively the same. The 7th Circuit Court of Appeals has stated that "[t]o qualify as an 'interested person,' at a minimum, a party must have Article III standing." *Texas Independent Producers and Royalty Owners Ass'n v. E.P.A.*, 435 F.3d 758, 764 (7th Cir. 2006) (citations omitted). Based on the

Supreme Court's decision in *Lujan v. Defenders of Wildlife* (504 U.S. 555, 560-61 (1992)), the 7th Circuit stated that, generally, Article III standing "requires a petitioner to 'demonstrate an injury in fact; a causal link between the injury and the challenged action; and redressability through a favorable court decision.'" *Texas Independent Producers*, 435 F.3d at 764 (citations omitted). An "injury in fact" entails an "invasion of a legally protected interest." *Lujan*, 504 U.S. at 560.

In Wisconsin the standing requirement for a petition for judicial review under Wis. Stat. §§ 227.52 and 227.53 encompasses a two-step analysis, which asks first "whether the decision of the agency directly causes injury to the interest of the petitioner," and second "whether the interest asserted is recognized by law." *Waste Management of Wisconsin, Inc. v. State of Wisconsin Department of Natural Resources*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988), citing *Wisconsin's Environmental Decade, Inc. v. Public Service Comm.*, 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975).

The three federal standing requirements are contained within Wisconsin's standing requirements. Wisconsin's requirement that the agency's decision directly cause the petitioners injury is the same as the Supreme Court's "causal link" requirement. Wisconsin's requirement that an asserted interest be recognized by law is the same as the Supreme Court's "injury in fact" requirement that requires an "invasion of a legally protected interest." The federal redressability requirement is implicitly contained within the Wisconsin standard for standing. Moreover, if there is no redressability, then the case is moot. "An issue is moot when the court concludes that its resolution cannot have any practical effect on the existing controversy." *PRN Associates LLC v. State, Dept. of Admin.*, 2009 WI 53, ¶ 29, 317 Wis. 2d 656, 766 N.W.2d 559, citing *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶ 11, 278 Wis. 2d 24, 692 N.W.2d 219.

It should be noted that 33 U.S.C. § 1369(b)(1) allows an interested party to challenge the issuance or denial of a permit within 120 days of the determination. Wisconsin Stat. § 227.53(1)(a) requires that the petition for review of an agency decision must occur within 30 days after the service of the decision. Petitioners in Wisconsin have the same right to challenge an agency decision even though they just have a shorter time frame in which to initiate the action.

2. In conjunction with your first question above, you ask whether any individual person may directly seek judicial review of the state's permit decision, or whether seeking administrative review under Wis. Stat. § 283.63 is a prerequisite to judicial review of the decision? For this question, you ask me to consider *Sewerage Commission v. DNR*, 102 Wis. 2d 613, 307 N.W. 2d 189 (1981) in my statement.

Response: In my view the answer is yes – an individual person may seek judicial review of the state's permit decision. However, other entities and groups of five individuals or more

must seek administrative review of the state's permit decision under Wis. Stat. § 283.63 before seeking judicial review of the decision.

Under Wis. Stat. § 283.63(1):

Any permit applicant, permittee, affected state or 5 or more persons may secure a review by the department of any permit denial, modification, suspension or revocation, the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit, any proposed thermal effluent limitation established under s. 283.17 or any water quality based effluent limitation established under s. 283.13 (5). . . .

Under Wis. Stat. § 283.63(2), the decisions of the DNR under this section are subject to judicial review as provided in §§ 227.52 to 227.58. By the express terms of Wis. Stat. § 283.63(1), a lone individual who is not an applicant, permittee, or affected state cannot secure an administrative review of a permit decision before seeking judicial review under Wis. Stat. § 283.63(2). Only a permit applicant, permittee, affected state, or five or more persons may secure the administrative review, and the judicial review that follows. Only Wis. Stat. §§ 227.52 to 227.58 is available to and provides the right of judicial review of agency WPDES decisions to individual persons who are not listed in Wis. Stat. § 283.63(1).

In *Sewerage Commission v. DNR*, 102 Wis. 2d 613, 307 N.W. 2d 189 (1981), the Wisconsin Supreme Court held that a judicial declaratory judgment action brought by a permittee, the Sewerage Commission, under Wis. Stat. § 227.05(1) (1973) – to declare invalid a DNR rule and the permit based on the rule – had to be dismissed because the exclusive means for obtaining that remedy was provided by operation of §§ 147.20 [now Wis. Stat. § 283.63], 227.05(2) [now § 227.40(2)] and 227.15-21 [now §§ 227.52-227.58]. That more specific procedure is to challenge the validity of the permit based on the invalid rule within the administrative and judicial review process for challenging WPDES permit provision under Wis. Stat. § 147.20 (1973). *Sewerage Commission* is distinguishable in a very crucial respect from the situation in the question you pose, and clearly does not apply to it. In that case, the Commission, as a "permittee" under § 147.20(1), had the right to administrative and judicial review of the challenged rule under § 147.20, of which the court held the Commission should have availed itself. See 102 Wis. 2d at 633. The court observed that under § 147.20, "[a] party affected by administrative action does not lose any rights, remedies, or forums by the preclusion of a later declaratory challenge Its rights and remedies under sec. 147.20 are the same" as under § 227.05. 332 Wis. 2d at 631. This is not so with respect to individual persons. Individual "affected" persons did not then, and do not today, have the right either to challenge a decision or to challenge a rule under Wis. Stat. § 283.63. Thus, the only means of judicial review of WPDES decisions for lone individuals is through Wis. Stat. §§ 227.52-227.58.

On the other side of the coin, however, the decision in *Sewerage Commission* strongly suggests that "[a]ny permit applicant, permittee, affected state or 5 or more persons" must invoke Wis. Stat. § 283.63 before attempting to obtain judicial review of a DNR WPDES permit. In *Sewerage Commission*, the Commission attempted to challenge the validity of the 1974 WPDES permits that contained a requirement to comply with permit limitations by January 1, 1975.¹ In that case, the Commission sought, a significant time after the permit was issued, to challenge the condition in the permit by filing an action under Wis. Stat. § 227.05(1) – the general provision in the Wisconsin Administrative Procedure Act (Wis. Stat. ch. 227) for challenging the validity of administrative rules. Although that case involved an action to declare an administrative rule invalid, the action sought to challenge the validity of the DNR permit that was based on the challenged rule. The court took note of the provision in Wis. Stat. § 227.05(2)(e) [now § 227.40(2)(e)] that states,

227.05 Declaratory judgment proceedings.

(2) The validity of a rule may be determined in any of the following judicial proceedings when material therein:

(e) Proceedings under ss. 227.15 to 227.21 . . . for review of decisions and orders of administrative agencies provided the validity of the rule involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

102 Wis. 2d at 626 (quotation marks removed). Wisconsin Stat. §§ 227.15 to 227.21 [now §§ 227.52-227.58] provide for judicial review of agency decisions. The court observed that the Commission could have challenged the validity of the permit by challenging the validity of the rule (on which the offending permit provision was based) at the time the permit was issued, and that it could and should have done so first by seeking administrative review under § 147.20:

Under sec. 147.20(2), Stats., the DNR's ruling on a challenge by a permit holder to the reasonableness or necessity of terms or conditions of the permit is expressly characterized as a "decision" judicially reviewable under secs. 227.15 to 227.21. Therefore, a declaratory challenge to the validity of the rule (NR 210.10) underlying such decision was available under the clear and unambiguous terms of sec. 227.05(2)(e). Under that statute, the only prerequisites for such a challenge would be that the validity of the rule first be raised before the agency, and that

¹ Although not discussed in the case, the running of the 30-day statute of limitations to obtain judicial review of the permit under Wis. Stat. §§ 227.15 et seq. may be why the Commission found it necessary to collaterally attack the permit in a declaratory judgment action. However, the parties do not appear to have raised, and the court did not address, the issue whether the declaratory judgment action was precluded by the Commission's failure to seek earlier judicial review of the permit under Wis. Stat. §§ 227.15 et seq. (now §§ 227.52-227.58).

judicial review thereof be undertaken within thirty days of the DNR's decision on the permit review. . . .

In other words, a declaratory challenge to the validity of a rule on which a permit is based is available under sec. 147.20, Stats., in joint operation with ch. 227. The only requirements are that such a challenge raised pursuant to the procedural dictates of sec. 147.20 must first be sought at the agency level within sixty days of issuance of the permit; the underlying rule must be challenged at that time; and within thirty days of the department's decision thereon, judicial review may be sought, including the raising of a declaratory challenge to the rule.

Sewerage Commission, 102 Wis. 2d at 626-627 (citation and emphasis omitted).

Based on this rationale, the court enunciated several holdings:

We conclude, therefore, that sec. 147.20 authorizes a permit holder to challenge the legality, and not just the factual reasonableness, of administrative action in setting permit terms and conditions. We also conclude that sec. 227.05(2)(e), Stats., if it is invoked upon timely judicial review of a department decision on a permit-review pursuant to compliance with the procedural terms of sec. 147.20, authorizes a declaratory challenge to the validity of the rule underlying the permit.

102 Wis. 2d at 628. The court also went on ultimately to hold, "We conclude that the commissions' failure to challenge the department's authority under the procedures of sec. 147.20, Stats., precluded the later challenge under ch. 227, because sec. 147.20 is the exclusive method of administrative and judicial review of the department's action." 102 Wis. 2d at 621. Moreover, the court quoted from *Superior v. Committee on Water Pollution*, 263 Wis. 23, 26, 56 N.W.2d 501 (1953), holding that an administrative order (more analogous to a permit decision) could not be attacked collaterally in a declaratory judgment action where a more specific procedure, "which, like sec. 147.20, included judicial review . . . subsequent to the agency's review of the challenge" *Sewerage Commission*, 102 Wis. 2d at 630.

For the above reasons, I believe that "[a]ny permit applicant, permittee, affected state or 5 or more persons" must invoke Wis. Stat. § 283.63 before attempting to obtain judicial review of a DNR WPDES permit term or condition. Finally, please note that Wis. Stat. § 283.63 and the *Sewerage Commission* case apply to reviews of the reasonableness and necessity of WPDES permit terms and conditions.² Neither Wis. Stat. § 283.63 nor the *Sewerage Commission* case,

² Wisconsin Stat. § 283.63(1) also applies to review of "any proposed thermal effluent limitation established under s. 283.17 or any water quality based effluent limitation established under s. 283.13 (5)." These are not the subject of your question, although there is no reason to believe the holdings in *Sewerage Commission* are not applicable to judicial challenges to them.

suggest that declaratory ruling actions under Wis. Stat. § 227.41 or declaratory judgment actions under Wis. Stat. § 227.40 may not apply to the application or validity of WPDES rules under other circumstances than those where a WPDES permit term or condition may be at issue.

Issue #7 NSPS.

Does the Department have authority, pursuant to Wis. Stat. § 283.31(3)(d) and Wis. Admin. Code § NR 220.13, to include limitations in permits based on federal NSPS (New Source Performance Standards) even if the Department has not yet promulgated new or revised rules for the NSPS in the administrative code?

Response: In my view the answer is yes. Clearly, the Department may include limitations in permits based on federal NSPS standards that already are in Department rules. Wis. Stat. § 283.31(3) provides in pertinent part, "The department may issue a permit under this section for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharges will meet . . . the following, whenever applicable: . . . (b) [s]tandards of performance for new sources." The standards in this section of the rule refer to "the state requirements provided in § 283.31(3)(a)-(c)." *Andersen v. Department of Natural Resources*, 2011 WI 19, ¶ 57, 332 Wis. 2d 41, 796 N.W.2d 1.

As for "new or revised" federal NSPS standards that have not been incorporated into Wisconsin permits, Wis. Admin. Code § NR 220.13, provides, "In the event that federal regulations establishing effluent guidelines have been promulgated for a point source included in one of the categories and classes of point sources listed in s. NR 220.02, the department may establish in the discharge permit for such source, effluent limitations based upon these federal regulations."

This rule is consistent with Wis. Stat. § 283.31(3), which provides that the "department may issue a permit . . . for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharges will meet . . . (d) [a]ny more stringent limitations, including those: 1. [n]ecessary to meet federal . . . water quality standards" or "2. . . . to comply with any applicable federal law or regulation." The statute is express and clear that the DNR may issue a permit that complies with federal new source performance standards and effluent limitations that are "more stringent" than state new source performance standards and limitations referred to in Wis. Stat. § 283.31(a)-(c) without DNR having first promulgated the federal standards as state rules. In *Andersen*, the Wisconsin Supreme Court sustained the Department's explanation of Wis. Stat. § 283.31(3)(d)2., which interprets that particular subsection as requiring "the DNR to issue permits that meet the requirements of 'any applicable federal law or regulation' that the EPA has promulgated over a state rule—that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)-(c)." *Andersen*, 332 Wis. 2d 41, ¶ 55. In *Andersen*, the court held that Wis. Stat. § 283.31(3)(d)2. applies only to new or revised federal standards or limitations that are "promulgated over a state rule", that is, over an existing state

rule within the contemplation of Wis. Stat. § 283.31(3)(a)-(c), which includes new source performance standards. 332 Wis. 2d 41, ¶¶ 55, 57. Based on the court's reasoning, it follows that if there are new or revised NSPS standards adopted by EPA and the state has not yet revised those new standards or limitations, the DNR still may include the new or revised more stringent federal limitations in the permit for the types of standards and limitations specified in Wis. Stat. § 283.31(3)(a)-(c). 332 Wis. 2d 41, ¶¶ 55, 57. As DNR has adopted NSPS rules as contemplated in Wis. Stat. § 283.31(3)(b), DNR may incorporate new "more stringent" federal NSPS standards in WPDES permits without having first incorporating them in DNR rules. *See also* discussion of *Andersen*, *infra*.

Issue #10 GLI Procedures.

Is the Department's interpretation of its authority under Wis. Stat. § 283.31 consistent with the Wisconsin Supreme Court's decision in the *Andersen* case? Specifically, does the Department have the authority to administer applicable provisions of 40 C.F.R. § 132.6 (concerning discharges of toxic substance to the Great Lakes Basin in Great Lakes states)?

Response: In my view the answer is yes. In *Andersen v. Department of Natural Resources*, the Wisconsin Supreme Court sustained the Department's interpretation of Wis. Stat. § 283.31(3)(d)2. that the "more stringent" language in the statute refers to "any applicable federal law or regulation that the EPA has promulgated over a state rule," 332 Wis. 2d 41, ¶ 57, "that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)-(c)." 332 Wis. 2d 41, ¶ 55. The court explained, "It is therefore reasonable to interpret the language of '[a]ny more stringent limitations' as referring back to the previous subsections; that is, pursuant to § 283.31(3)(d)2, all WPDES permits, whenever applicable, must meet more stringent limitations than the state requirements provided in § 283.31(3)(a)-(c)." 332 Wis. 2d 41, ¶ 57. As an example of a regulation that the EPA has promulgated over a state rule, the court cited 40 C.F.R. § 132.6(f) – (j), which "expressly apply[s] certain federal requirements to the Great Lakes System in the State of Wisconsin." 332 Wis. 2d 41, ¶ 55, n. 20. It is necessary for the Department to set more stringent effluent limitations and standards in discharge permits in order to comply with the procedures contained within 40 C.F.R. § 132.6(f) – (j). Because the applicable provisions of 40 C.F.R. § 132.6 were promulgated by the EPA "over a state rule," as that term is used in *Andersen*, and the Department's interpretation of Wis. Stat. § 283.31(3)(d)2. is valid, the Department is authorized to administer those provisions in WPDES permits for discharges to the Great Lakes Basin.

Issue # 12 Downstream Waters.

Does the Department have authority to impose permit conditions to assure compliance with the applicable water quality requirements of all affected states (including tribes)?

Response: In my view the answer is yes. Wisconsin Stat. § 283.13(5) provides that the Department "shall require compliance with . . . water quality based effluent limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation." Under 40 C.F.R. § 131.8, the EPA may approve a federally recognized Indian tribe to administer a water quality standards program in the same manner as a state.

In addition, Wis. Stat. § 283.31(3)(d)1. and 2. allows the Department to issue a WPDES permit with more stringent limitations if "[n]ecessary to meet federal or state water quality standards" or "[n]ecessary to comply with any applicable federal law or regulation." Wisconsin Admin. Code §§ NR 106.06(1)(b)1., NR 106.32(1)(b), 106.55(9), and 106.56(9) all contain provisions allowing the Department to establish water quality based effluent limitations necessary to protect downstream waters. The term "downstream waters" as used in these rules is not limited to intrastate waters. Downstream waters would include navigable waters of the United States that are protected by state and tribal water quality standards that have been adopted in compliance with and as required by the federal Clean Water Act. *See* 33 U.S.C. § 1312(a).

Also, Wis. Stat. § 283.41 and Wis. Admin. Code § NR 203.03 require the Department to provide notice of receipt of a completed permit application to other government agencies, which include "other states potentially affected by the proposed discharge." State and tribal government agencies are permitted to "obtain additional information, submit written comments, or request a public hearing with respect to issuance of a particular permit." Wis. Admin. Code § NR 203.03(1).

Issue # 19 and #44 Concentrated Aquatic Animal Production facilities and the definitions of point source and pollutant.

1. Does the Department have the authority to issue WPDES permits to fish hatcheries that meet the definition of concentrated aquatic animal production facilities?

Response: In my view the answer is yes. The department also has the authority to issue WPDES permits to fish hatcheries that do not meet the definition of concentrated aquatic animal production facilities. You state that DNR has been issuing WPDES permits to fish hatcheries that meet the definition of concentrated aquatic animal production facilities under Wis. Stat. §§ 283.01(12) & (13), and 283.31.

40 C.F.R. § 122.24 (b) & (c) provide:

(b) Definition. "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility which meets the criteria in Appendix C of this part, or which the Director designates under paragraph (c) of this section.

(c) Case-by-case designation of concentrated aquatic animal production facilities.

(1) The Director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States. . . .

Appendix C prescribes standard criteria for defining a concentrated aquatic animal production facility as containing fish species or other aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year, and are fed threshold amounts of food or produce threshold amounts (by weight) of fish.

Wisconsin Stat. § 283.31(1) provides in pertinent part, "The discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge or disposal is done under a permit issued by the department under this section" Wisconsin Stat. § 283.01(12) defines a point source as "[a] discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, . . . container . . . from which pollutants may be discharged . . . into waters of the state." The purpose of fish hatcheries and aquatic animal production facilities is to confine, produce and cultivate fish for either consumption or for stocking waterways. Fish hatcheries and concentrated aquatic animal production facilities are and operate by use of some or all of the conveyances described in Wis. Stat. § 283.01(12). The feces and waste products produced at fish hatcheries and concentrated aquatic animal production facilities consist of biological materials, which are defined under Wis. Stat. § 283.01(13) as a pollutant. Wisconsin Admin. Code § NR 220.02(20) appropriately includes fish hatcheries as point sources that are regulated under Wis. Stat. ch. 283.

2. Are the definitions of "discharge" and "point source" broad enough to require permits for discharges from landfill leachate collection systems?

Response: In my view the answer is yes. Landfill leachate contains material that is defined as a pollutant under Wis. Stat. § 283.01(13). Any landfill leachate collection system that discharges to any water of the state, which includes groundwater under Wis. Stat. § 283.01(20), meets the definition of a "discharge" and "discharge of pollutant" under Wis. Stat. § 283.01 (4) & (5), respectively. A landfill leachate collection system that discharges to waters of the state satisfies the definition of point source under Wis. Stat. § 283.01(12)(a) because a collection system is a discernible, confined and discrete conveyance of pollutants that discharge to waters of the state. The discharge of pollutants from a leachate collection system to waters of the state is prohibited unless permitted by DNR. Wis. Stat. § 283.31(1).

3. Is the definition of "pollutant" broad enough to cover discharges of filter backwash from a point source?

Response: In my view the answer is yes. The purpose of backwashing a filter is to remove dirt, filth, grease, fibers, particles and other pollutants from the filter's pores. The particles being removed by the backwashing process are either (a) pollutants that are already the subject of a WPDES permit (thus requiring the filter), or (b) fit into the broad definition of pollutant under Wis. Stat. § 283.01(13), which includes solid waste, chemical waste, biological material, rock, sand, and industrial, municipal, and agricultural waste.

Issue # 51 Request for an Informational Hearing.

Is Wisconsin law, concerning an individual's request for a public hearing on a draft WPDES permit, consistent with federal regulations?

Response: In my view the answer is yes. 40 C.F.R. § 124.11 states that "any interested person . . . may request a public hearing on the draft permit." 40 C.F.R. § 124.12(a)(1) states that "[t]he Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest" Wisconsin Stat. § 283.49(1)(a) states that any person may request a public hearing, and that the request must "indicate the interest of the party filing the request and the reasons why a hearing is warranted." In addition, Wisconsin Stat. § 283.49(1)(b) states that "[t]he department shall hold a public hearing on a permit application . . . on the petition of 5 or more persons or if the department deems that there is a significant public interest in holding such a hearing." Wisconsin Stat. § 283.49(1)(a) clearly provides any interested individual the right to request a public hearing and for the DNR to grant it based on the person's interest and reasons warranting a hearing. Therefore, the requirement in 40 C.F.R. § 124.11, that any interested person may request a public hearing, is satisfied. Wisconsin Stat. § 283.49(1)(b) clearly provides the Department discretion to grant a public hearing based on sufficient public interest. Like 40 C.F.R. § 124.12(1), the Department is required to hold a public hearing when it "deems that there is a significant public interest in holding such a hearing." Wis. Stat. § 283.49(1)(b). Therefore, the requirements of 40 C.F.R. § 124.12(1) are satisfied by Wisconsin law.

Issue # 58 Waters of the State Definition.

Is Wisconsin's definition of "waters of the state" broad enough to include mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, and playa lakes?

Response: In my view the answer is yes. Wisconsin's broad definition of "waters of the state" is "those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are

entirely confined and retained completely upon the property of a person." Wis. Stat. § 283.01(20); *See also* Wis. Admin. Code § NR 205.03(44).

The definition includes wetlands and other water places where water is part of the groundwater or near or at the surface. Wisconsin statutes define "wetland" as "an area where water is at, near, or above the land surface long enough to be capable of supporting aquatic or hydrophytic vegetation and which has soils indicative of wet conditions." Wis. Stat. §§ 23.32(1) and 281.01(21). Under Wis. Stat. § 281.15(1), the Department is required to establish water quality standards for all waters of the state. As a result, the Department promulgated Wis. Admin. Code ch. NR 103, Water Quality Standards for Wetlands.

Moreover, the phrase "other surface water or groundwater" in Wis. Stat. § 283.01(20) is broad enough to include mudflats, sandflats, sloughs, prairie potholes, wet meadows, and playa lakes which, like wetlands, are areas that consist of water either below, at, or above the land surface, which is surface or ground water. Point source discharges into these areas undoubtedly would enter ground or surface waters, and thus are prohibited without a permit.

Issue # 59 Exemption for Disposal of Solid Waste to a Landfill – Wis. Admin. Code § NR 200.03(3)(f).

Is the exemption from a permit application for disposal of solid waste into a solid waste facility consistent with federal law?

Response: In my view the answer is yes. The exemption in Wis. Admin. Code § NR 200.03(3)(f) allows a person to deposit solid waste into a licensed solid waste facility without obtaining a pollution discharge permit. A solid waste facility is not included among "waters of the state" and, therefore, a discharge of solid waste to a solid waste facility does not require a WPDES permit. *See* Wis. Stat. § 283.31(1); Wis. Admin. Code § NR 200.03(1). If the solid waste facility discharges solid waste into ground or surface waters of the state, then the solid waste facility is a point source and must have a WPDES permit.

Issue # 60 Exemption for Discharges from Private Alcohol Fuel Production Systems in Wis. Stat. § 283.61.

Does the Attorney General agree with the Department's interpretation of the law that the private alcohol fuel production systems exemption does not apply to discharges from such systems that reach waters of the United States?

Response: The answer is yes. "Waters of the United States" as that term is used in the Clean Water Act are navigable surface waters, or waters or wetlands having a sufficient "nexus" to them so that pollution of them would "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos v.*

U.S., 547 U.S. 715, 780 (2006, Kennedy, J., concurring); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167-168 (2001). "Waters of the state" are ground and surface waters, Wis. Stat. § 283.01(20), and thus include "waters of the United States."

Under Wis. Stat. § 283.61(2), the owner of a private alcohol fuel production system is not required to obtain a WPDES permit "to discharge or dispose of any distillate waste product if the waste product is stored in an environmentally sound storage facility and disposed of using an environmentally safe land spreading technique and the discharge or disposal is confined to the property of the owner." An environmentally sound storage facility is a distillate waste facility that does not allow any waste products to "enter or leach into the waters of the state." Wis. Stat. §§ 283.61(1)(b) and 289.44(1)(b). Thus, no permit is required for a distillate waste storage facility that is stored in an environmentally sound manner because there would be no discharge. If discharges from such facilities were to occur, they would violate the prohibition of discharges from point sources without a permit. Wis. Stat. § 283.31(1).

As for discharges and disposal of distillate waste product, the statute requires that it be "disposed of using an environmentally safe land spreading technique and the discharge or disposal is confined to the property of the owner." An "environmentally safe land spreading technique" is not defined in the statutes or Department rules. However, by requiring an "environmentally safe land spreading technique," the owner must discharge the distillate waste onto land, as opposed to discharging into surface water, whether directly or indirectly. Moreover, if the discharge were to enter a surface water, then it would no longer be confined exclusively to the owner's land.

Issue # 63 False Statements.

Does the state have the authority under either state statutes or rules to assess multiple penalties for multiple instances of knowingly making false statements consistent with 40 C.F.R. § 123.27?

Response: In my view the answer is yes. 40 C.F.R. § 123.27(a)(3)(iii) states that "[c]riminal fines shall be recoverable against any person who knowingly makes any false statement . . . fines shall be recoverable . . . for each instance of violation." Wisconsin Stat. § 283.91(4) states that "[a]ny person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter shall be fined not less than \$10 nor more than \$10,000 or imprisoned for not more than 6 months or both."

On its face, Wis. Stat. § 283.91(4) allows the assessment of multiple penalties for multiple instances, respectively, of knowingly making false statements. The statute states that

"any" person making "any" false statement on "any" application shall be fined. Therefore, each false statement made by a person on a single application is a false statement that will subject the person to a fine or imprisonment. This is not only the interpretation of the Department, but is also the interpretation and practice of the Department of Justice in charging violations under this statute.

Issue # 64 Public Participation in Enforcement Process.

Does the state provide for public participation in the state enforcement process consistent with 40 CFR § 123.27(d)?

Response: In my view the answer is yes. 40 CFR § 123.27(d) requires any state administering the NPDES program to "provide for public participation in the State enforcement process by providing either:" (1) an ability for adversely affected citizens to intervene, as a matter of right, "in any civil or administrative action to obtain remedies" for violations of the State NPDES program, or (2) by providing a system in which the Department or the DOJ will "provide written responses to all citizen complaints," "[n]ot oppose intervention by any citizen" when authorized by law, and "[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action."

The State does not provide for administrative enforcement actions under Wis. Stat. ch. 283. All enforcement actions are civil or criminal in nature. The State provides for public participation under option (1) above by allowing adversely affected citizens to intervene in any civil enforcement action. Wisconsin Stat. § 803.09(1) provides a right of intervention by anyone in an action if they meet the following requirements: "(1) that the motion to intervene be made in a timely fashion; (2) that the movant claims an interest relating to the property or transaction which is the subject of the action; (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest is not adequately represented by existing parties." *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994). The State often settles an enforcement action before a complaint is filed with a court, and then files the complaint and a stipulation and order for judgment at the same time effectively beginning and ending the lawsuit on the same day. An entry of judgment is not a bar to intervention. The Wisconsin Court of Appeals stated that "[t]he general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." *Sewerage Commission of the City of Milwaukee v. Department of Natural Resources*, 104 Wis. 2d 182, 188, 311 N.W.2d 677 (Ct. App. 1981), quoting *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.), cert. denied, *National Farmers' Organization, Inc. v. U.S.*, 429 U.S. 940 (1976). "[P]ost judgment intervention may be allowed where it is the only way to protect the movant's rights." *Sewage Commission*, 104 Wis. 2d at 188.

Issue # 75 Wis. Stat. § 227.10(2m).

Taking into account the recent enactment of Wis. Stat. § 227.10(2m), does the state still have adequate permitting and enforcement authority required pursuant to 40 C.F.R. §§ 123.25 and 123.27?

Response: In my view the answer is yes. 40 C.F.R. §§ 123.25 and 123.27 are provided with this letter. They provide a list of the federal requirements for permitting and enforcement, respectively. Your question is whether the long-standing authority to comply with these requirements remains after enactment of Wis. Stat. § 227.10(2m). Recently enacted Wis. Stat. § 227.10(2m) states, in part, that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter."

First, the enactment of Wis. Stat. § 227.10(2m) did not change the Department's express and clear authority for permitting discharge of pollutants as stated in 40 C.F.R. § 123.25. Under Wis. Stat. § 283.31(1), "[t]he discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge . . . is done under a permit issued by the department." The Department is "explicitly" granted authority to issue a permit for the discharge of a pollutant based on whether the discharge will meet certain limitations and standards, including any more stringent limitation "[n]ecessary to comply with any applicable federal law or regulation." Wis. Stat. § 283.31(3).

The enactment of Wis. Stat. § 227.10(2m) did not change the Department's explicit authority and duty to promulgate rules that ensure compliance with federal standards. Wisconsin Stat. § 283.001(2) states that "[t]he purpose of [Wis. Stat. ch. 283] is to grant to the department of natural resources all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate the policy set forth under sub. (1) and *consistent with all the requirements of the federal water pollution control act amendments of 1972, P.L. 92-500; 86 Stat. 816.*" (Emphasis added.) That authority specifically is provided under Wis. Stat. § 283.11(1), in which the Department is explicitly required to "promulgate by rule effluent limitations, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards for any category or class of point sources established by the U.S. environmental protection agency and for which that agency has promulgated any effluent limitations, toxic effluent standards or prohibitions or pretreatment standards for any pollutant." Furthermore, Wis. Stat. § 283.11(2) explicitly requires that all rules promulgated by the Department under Wis. Stat. ch. 283 "as they relate to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards shall comply with and not exceed the requirements of the federal water pollution control act, 33 USC 1251 to 1387."

Second, the Department has adequate authority to enforce WPDES permits as required by 40 C.F.R. § 123.27. Wisconsin Stat. § 283.91(1) states that "[t]he department of justice . . . may initiate a civil action for a temporary or permanent injunction for any violation of this chapter or any rule promulgated thereunder or of a term or condition of any permit issued under this chapter." Any person that violates a term or condition of a permit or knowingly makes false statements is subject to forfeitures and may be subject to imprisonment. Wis. Stat. § 283.91(2), (3), and (4). *See also* Wis. Stat. § 299.95.

Issue: What are the primary holdings in *Andersen v. Department of Natural Resources*, 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1?

You ask for a statement on the primary holdings in the *Andersen* case.

Response: The primary holding of *Andersen* is that "Wis. Stat. § 283.63 does not require the DNR to hold a public hearing on a petition for review when the premise of the petition is that the permit fails to comply with basic requirements of the federal Clean Water Act and federal regulations promulgated thereunder." 332 Wis. 2d 41, ¶ 58. *See also* ¶ 8. *See also* discussion above under "Issue #7 NSPS" and "Issue #10 GLI Procedures."

The court also held that there is no provision in state law, i.e., Wis. Stat. ch. 283, that *generally* requires DNR to issue permits (as opposed to rules, 332 Wis. 2d 41, ¶¶ 43, 51) that comply with federal Clean Water Act standards.

The court did hold, however, there is one narrow exception in state law that requires DNR to issue a permit in compliance with a federal standard. The court held that Wis. Stat. § 283.31(3)(d)2. requires DNR to establish more stringent limitations in permits where "EPA has promulgated over a state rule – that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)-(c)." 332 Wis. 2d 41, ¶ 55, 57. The court held that where new or revised federal laws or regulations are promulgated by EPA and dictate a more stringent limitation compared to the *existing* state limitations and standards listed in Wis. Stat. § 283.31(3)(a)-(c), the DNR has the authority to include those new or revised more stringent federal limitations in state permits. The court held, however, that these conditions for operation of the exception did not exist in that case.

In *Andersen*, petitioners did not argue that the WPDES permit was inconsistent with an existing *state* law or standard. Rather, they argued that some of the terms in the state permit were inconsistent with *federal* Clean Water Act standards, that state permits must be consistent with federal law and standards and, therefore, some of the state permit terms were invalid. *Id.* at ¶¶ 12, 17. The court concluded that in such a situation "only the EPA has the authority to determine whether a WPDES permit comports with federal law." *Id.* at ¶ 25. The EPA has the authority to object to the permit as being inconsistent with federal law, but did not in this case. *Id.* at ¶ 62. "[T]he EPA has the authority to withdraw its approval of a state's permit program if

the program no longer complies with the requirements of 40 C.F.R. pt. 123 and of the Clean Water Act, and if the state fails to take corrective action." 332 Wis. 2d 41, ¶ 39. At that point, EPA may choose to administer and enforce the federal Clean Water Act provisions in the noncomplying state. *Id.* at ¶¶ 35, 36.

This holding and conclusion are consistent with well established law governing the relationship in our federal system between the states and the federal government that respects state sovereignty. States administer and enforce state laws. They do not administer and enforce federal laws. Neither the courts nor EPA can legally force Wisconsin to administer a federal permit provision. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. . . . Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *New York v. U.S.*, 505 U.S. 144, 178 (1992). Under the "partnership" of "cooperative federalism" envisioned in the Clean Water Act, the states do not administer and enforce the federal law, *per se*. If states choose to administer laws and programs consistent with federal laws and programs, they do so only voluntarily and as a matter of state law. Only the federal government may enforce federal laws.

Consistent with cooperative federalism principles, the court in *Andersen* recognized that if a state wishes to administer state laws that are similar to or mirror-images of provisions of the Clean Water Act, "the Clean Water Act empowers each state to administer 'its own permit program for discharges into navigable waters within its jurisdiction . . .'" – under state law consistent with the Clean Water Act. *Andersen*, 332 Wis. 2d 41, ¶ 34. Such so-called "delegated" state programs are administered under *state* law, however, with or without federal approval. The benefit of EPA approval, of course, is that under the Clean Water Act "[o]nce a state program is approved, the EPA must suspend its own issuance of NPDES permits covering the navigable waters subject to the state program." *Id.* at ¶ 36.

Make no mistake, however, the state is administering state law, here Wis. Stat. ch. 283, not the federal Clean Water Act, in Wisconsin. For example, as stated previously, Wis. Stat. § 283.11(1) & (2) require DNR to adopt rules consistent with the requirements of the Clean Water Act. To the extent that Wisconsin permits might not be consistent with the Clean Water Act and its regulations, this would not be a "violation" of the Clean Water Act *per se*, certainly not in the sense that the state can be forced to administer the Act as EPA requires, or that the inconsistency may be enforced by fines or injunction. It merely means, as the court in *Andersen* said, that when there is no violation of state law and it is alleged that a state permit is inconsistent with the existing federal law, it is up to EPA, the agency that administers and enforces the federal law, to decide whether a permit or the state program does not comply with federal law. Such a decision could then precipitate an EPA objection to the state permit and resolution between DNR and EPA, issuance of an EPA permit with required limitations, or in an extreme case EPA disapproval of Wisconsin's program and decision to administer the federal program by issuing its own permits in Wisconsin. Under any circumstance, EPA cannot amend or repeal

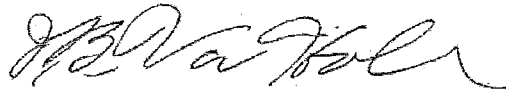
Wis. Stat. ch. 283, nor may it impose the Clean Water Act on Wisconsin to administer. Of course, the whole point of Wis. Stat. ch. 283 and Wisconsin's WPDES program is to allow the State to administer a program that would not invite such federal intervention.

In *Andersen*, because DNR is authorized to administer the WPDES program only as directed under state law, the issue before the court was whether DNR's permit terms violated state law, not whether DNR's permit terms violated federal law. As stated above, the court could find no state law that generally required DNR to issue a permit that includes all federal requirements. As noted above, Wis. Stat. § 283.11 does require DNR to adopt rules consistent with the requirements of the Clean Water Act.

The court did hold that one state law, Wis. Stat. § 283.31(3)(d)2., does specifically require DNR to issue permits consistent with "any applicable federal law or regulation that the EPA has promulgated over a state rule," 332 Wis. 2d 41, ¶ 57, – "that is, a federal law or regulation that is 'more stringent' than the limitations provided in § 283.31(3)(a)–(c)." 332 Wis. 2d 41, ¶ 55. The court held, however, that it did not apply in this case. "By the statute's plain language, the 'applicable federal law or regulation' must provide for a 'more stringent limitation[]' than something else. It is therefore reasonable to interpret the language of '[a]ny more stringent limitations' as referring back to the previous subsections; that is, pursuant to § 283.31(3)(d)2, all WPDES permits, whenever applicable, must meet more stringent limitations than the state requirements provided in § 283.31(3)(a)–(c), including those necessary to comply with any applicable federal law or regulation." 332 Wis. 2d 41, ¶ 57. The court agreed with DNR's interpretation that this statutory provision applies in those situations where EPA has overpromulgated the state rules. It follows that it also applies to those situations where EPA has promulgated a new or revised more stringent limitation that is the type of limitations in Wis. Stat. § 283.31(3)(a)–(c), but where the state has not yet updated its regulation to include the limitation. Thus, Wis. Stat. § 283.31(3)(d)2. did not apply to require the federal standard to be incorporated in the state permit. The court correctly held that the only remedy for the situation in *Andersen* "rests with the EPA" under federal law. 332 Wis. 2d 41, ¶¶ 8, 65, 66.

If you have any questions regarding the Department of Justice's response to the issues detailed in your October 14, 2011 letter, please contact Assistant Attorney General Thomas Dawson at (608) 266-8987.

Sincerely,



J.B. VAN HOLLEN
Attorney General



followup

Barbara Wester to: Nyffeler, Robin T - DNR

04/10/2012 02:47 PM

From: Barbara Wester/R5/USEPA/US
To: "Nyffeler, Robin T - DNR" <Robin.Nyffeler@Wisconsin.gov>

Robin - as a followup to our call, you were going to provide more detail to supplement the January 19, 2012 letter from J.B. Van Hollen to Matt Moroney, regarding two issues, and I will followup on a 3d issue.

Issue #5 (judicial review): You were also going to provide a copy of the *Rock Dairy Prairie* case, as a supplement to the discussion in the January 19 letter.

Issue #75 (interpretation of *Andersen v. Department of Natural Resources*): Specifically, you were going to provide clarification of DNR's authority to issue permits consistent with federal requirements where EPA has promulgated a new or revised more stringent limitation (such as the limitations covered in Wis. Stat. sec. 283.31(3)(a)-(c) but where the state has no equivalent standard (as opposed to where the state has an existing standard that has not yet been updated or is not as stringent). Also, would the state be able to incorporate a more stringent federal requirement where the requirement was not one of those limitations contemplated in Wis. Stat. sec. 283.31(3)(a)-(c)? You were also going to look into whether there might be examples of such incorporation of federal requirements in cases where EPA may have objected to a state-proposed permit.

I will be following up on our discussion of issue 64 (public participation in the enforcement process) to see if we will need more information to supplement the January 19 letter.

Let me know if I missed anything, thanks, Barbara

Barbara L. Wester
Associate Regional Counsel
Office of the Regional Counsel
U.S. Environmental Protection Agency, Region V
Mail Code C-14J
77 W. Jackson Blvd.
Chicago, IL 60604
ph: 312.353.8514
fax: 312.582.5132
wester.barbara@epa.gov



DRAFT Milestone Schedule for EPA 75 issues

Nyffeler, Robin T - DNR

to:

Stephen Jann, Barbara Wester

03/06/2012 03:37 PM

Cc:

"Sylvester, Susan - DNR", "Biersach, Pamela A - DNR", "Mugan, Tom J - DNR", "Lemcke, Michael D - DNR", "Lowndes, MaryAnne - DNR", "Landretti, Jane R - DNR", "Ohm, Judith M - DNR"

Hide Details

From: "Nyffeler, Robin T - DNR" <Robin.Nyffeler@Wisconsin.gov> Sort List...

To: Stephen Jann/R5/USEPA/US@EPA, Barbara Wester/R5/USEPA/US@EPA,

Cc: "Sylvester, Susan - DNR" <Susan.Sylvester@Wisconsin.gov>, "Biersach, Pamela A - DNR" <Pamela.Biersach@Wisconsin.gov>, "Mugan, Tom J - DNR"

<Tom.Mugan@Wisconsin.gov>, "Lemcke, Michael D - DNR"

<Michael.Lemcke@Wisconsin.gov>, "Lowndes, MaryAnne - DNR"

<MaryAnne.Lowndes@wisconsin.gov>, "Landretti, Jane R - DNR"

<Jane.Landretti@wisconsin.gov>, "Ohm, Judith M - DNR" <Judith.Ohm@Wisconsin.gov>

History: This message has been forwarded.

2 Attachments



75SCHEDULE-DRAFTMILESTONES3-6-12.pdf 75SCHEDULEstormwaterMILESTONES.pdf

You had requested a draft milestones proposal containing a more detailed rule schedule by the first week in March. Here is a draft schedule for discussion. The dates were developed based on input from WDNR staff and the new rule making procedures in Wisconsin (WDNR rules also require Natural Resource Board approval at various steps in the process). Please contact Susan Sylvester when you are ready to meet again to discuss this schedule and other issues.



Robin T. Nyffeler

Attorney, Bureau of Legal Services

Wisconsin Department of Natural Resources

(☎) phone: (608) 266-0024

(☎) fax: (608) 266-6983

(✉) e-mail: Robin.Nyffeler@wisconsin.gov

CONFIDENTIALITY: This message may contain information which, by law, is privileged, confidential or exempt from disclosure. Contact the sender for permission prior to disclosing the contents of this message to any other person.

This message is intended solely for the use of the addressee. If you are not the addressee, you are hereby notified that any use, distribution or copying of this message is strictly prohibited. If you received this message in error, please notify us by reply e-mail or by telephone and immediately delete this message and any and all of its attachments.

SCHEDULE/MILESTONES – 75 (DRAFT TO EPA 3/06/2012)

I. RULE MAKING SCHEDULES:

Rule Package 1 - Sanitary Sewer Overflows (SSOs) & Bypassing

Federal Issue: Issue # 1 (SSOs)

Rulemaking Schedule:

- Rule Draft Completed – December 2011
- NRB Authorization for Hearing – January 2012
- EIA Process Completed – May 2012
- Public Hearings – August 2012
- NRB Adoption – October 2012
- Submit Rule for Legislative Review – January 2013
- Effective – After completion of Legislative review

(Note: Scope statement was published prior to June 8, 2011)

Rule Package 2 – Pretreatment:

Federal Issues: Issue # 16 (Pretreatment)

Rulemaking Schedule

- Rule Draft Completed and EIA Process Completed – October 2012
- NRB Authorization for Hearing – December 2012
- Public Hearings – March 2013
- NRB Adoption – May 2013
- Submit Rule to Legislature – July 2013
- Effective Date – After completion of legislative review process

(Note: Scope Statement was published prior to June 8, 2011)

Rule Package 3 – NR 106 Issues and Some Great Lakes Initiative (GLI) Issues :

Federal Issues:

- Issue # 8 Mercury Reasonable Potential
- Issue # 10 (Intake Pollutants)
- Issue # 17 Noncontact Cooling Water Exemption Issue # 71
- Mixing Zone Phase out for Bioaccumulative Chemicals of Concern (BCCs)

Rulemaking Schedule

- **Rule Draft Completed and EIA Process Completed** – November 2012
- **NRB Authorization for Hearing** – January 2013
- **Public Hearings** – May 2013
- **NRB Adoption** – September 2013
- **Submit Rule to Legislature** – November 2013
- **Effective Date** – After completion of legislative review process

(Note: Scope statement was published prior to June 8, 2011)

Rule Package 4 – Additional NR 106 Issues):

Federal Issues:

- Issue # 28 (Acute limits = FAV)
- Issue # 32 Tier II Value Compliance Schedule Provision
- Issues #31, 35, 36, 37 and 38 (ammonia)
- Issues 2, 30 34,41 (expression of limits)
- Issues #39 – 43 (chloride)
- Issue # 70 (alternative limit when results cannot be quantified)
- Issue # 10 and #74 Regarding Whole Effluent Toxicity Reasonable Potential (WET R.P.) and Other WET issues and
- Issue # 10 – TMDL procedures for discharges in the Great Lakes Basin

Rulemaking Schedule:

- **Scoping Statement to Governor** – November 2012
 - **Approval from Governor to proceed** – January 2013
 - **Scope Statement Submitted to NRB for Approval** – February 2013
 - **Rule Draft Completed and EIA Process Completed** – December 2013
 - **NRB Authorization for Hearing** – February 2014
 - **Public Hearings** – April 2014
 - **NRB Adoption** – August 2014
 - **Submit Rule to Governor** – September 2014
 - **Written Approval from Governor** – November 2014
 - **Submit Rule to Legislature for review**– January 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 5 – NR 200, NR 205, NR 220 - Technology Based Limit Issues, New Source Performance Standards (NSPS), Expression of Limits Generally, Mass limits, Generic Reasonable Potential, Pollutants in the Intake for Technology Based Limits, BMP limits, General Compliance Schedule provisions, Waters of the State (note to definition), Permit application requirements for Industrial groups, Intake requirements for new facilities (316(b)):

Federal Issues:

- Issue # 2 (122.45 (a) and (h), (b)(1), (c), (d), (f) and (g), (i))
- Issue # 7 (NSPS)
- Issue #11 (Generic RP)
- Issue #13 (Best Management Practice (BMP) authority)
- Issue #15 (General Compliance Schedule language)
- Issue # 20 (Adjustment to Technology Limits)
- Issue # 29 (solid waste leachate provision in compliance schedules)
- Issue # 46 (expedited variance for technology based limits))
- Issue 61 (application requirements for certain classified groups)
- Issue 14 (Antibacksliding)

Rulemaking Schedule

- **Scoping Statement to Governor – June 2013**
 - **Approval from Governor to proceed – July 2013**
 - **Scope Statement Submitted to NRB for Approval – Sept 2013**
 - **Rule Draft Completed and EIA Process Completed – April 2014**
 - **NRB Authorization for Hearing – July 2014**
 - **Public Hearings – October 2014**
 - **NRB Adoption – January 2015**
 - **Submit Rule to Governor – February 2015**
 - **Written Approval from Governor – April 2015**
 - **Rule to Legislature for review– June 2015**
 - **Effective Date – After completion of legislative review process**
-

Rule Package 6 – Permit Processing Issues and other Permit Issuance Procedural Matters:

Federal Issues:

- Issue 3 (Process for citizens to request permit modifications)
- Issue 18 (signatures of permit applications)
- Issue 21 and 66 (Fact Sheets)
- Issue 22 (Sending Draft Permits to Agencies)
- Issue 45 (permits not a property interest, permit shield provisions)
- Issues 47 (Signatory to permit)
- Issue 48 and 50 (Termination of permit procedures)
- Issue 49 (notification of permit changes)
- Issue 51(public info hearing procedures requests)
- Issue 62 (suspension of permits)
- Issue 65 (preparation of draft permit required)

Rulemaking Schedule

- **Scoping Statement to Governor – February 2013**
- **Approval from Governor to proceed – April 2013**
- **Scope Statement Submitted to NRB for Approval – May 2013**
- **Rule Draft Completed and EIA Process Completed – December 2013**

- **NRB Authorization for Hearing** – January 2014
- **Public Hearings** – March 2014
- **NRB Adoption** – June 2014
- **Submit Rule to Governor** – July 2014
- **Written Approval from Governor** – September 2014
- **Submit Rule to Legislature for review**– January 2015
- **Effective Date** – After completion of legislative review process

Note: Many of the issues in this package may be resolved more quickly through an Addendum to the MOA or through statutory changes

II: OTHER SCHEDULES:

1. A proposed schedule is attached for storm water.
2. EPA will submit proposed Memorandum of Agreement Addendum language to WDNR by (insert date }
3. The Department has requested legislative changes. Department staff will notify EPA if legislation is introduced this session
4. EPA Region V attorney will contact WDNR attorney to arrange a call to discuss the AG's Statement. **Note: Some of the issues for rule making listed above may already be addressed by the AG's statement, but the WDNR may still revise rules for clarification.**
5. A few remaining issues still require further discussion.

| Item No./Issue | Response | Timeline | Comments |
|--|---|---|---|
| Item 23 - Storm Water: WisDOT permitting exemption under s. 30.2022(1), Wis. Stats., and s. NR 216.42(5), Wis. Adm. Code. | Repeal of the s. 283.33, Wis. Stat., exemption in s. 30.2022(1) will require a statutory change. Remove exemption language from s. NR 216.42(5), Wis. Adm. Code. | Submit recommendation to the legislature in 2013 that s. 283.33 be removed from the list of exemptions. In the meantime, the DNR and the WisDOT will work on administrative and transitional issues in preparation for this change. Two to four years. | The DNR can recommend the appropriate legislation but will have no control over whether a statutory change occurs. If the exemption is repealed by statute, removal of the exemption in the rule will be necessary to avoid confusion. However, a rule change in the absence of a statutory change will not be meaningful. |
| Item 24 - Storm Water: Commercial buildings regulated by the Dept. of Commerce (now the Dept. of Safety and Professional Services [DSPS]) under s. NR 216.42(4), Wis. Adm. Code. | Repeal of the provision of 2011 Wisconsin Act 32 that transferred to DSPS the regulatory responsibilities for erosion control at commercial building sites will require a statutory change. Remove exemption language from s. NR | Submit recommendation to the legislature to repeal the relevant portion of 2011 Wisconsin Act 32. Alternatively, recommend language that clearly retains the permitting authority to the DNR. In the meantime, permitting will continue to be handled by the DNR. Two to four years. | The DNR can recommend the appropriate legislation but will have no control over whether a statutory change occurs. If the DSPS language is repealed by statute, removal of the exemption in the rule will be necessary to avoid |

| | | | |
|---|--|--|---|
| | 216.42(4), Wis. Adm. Code. | | confusion. However, a rule change in the absence of a statutory change will not be meaningful. |
| Item 24 - Storm Water: Regulation of construction site storm water discharges under other environmental programs under s. NR 216.42(6), Wis. Adm. Code. | The DNR will develop and implement a manual code, approved by the EPA, that will more clearly delineate the circumstances under which this provision may be invoked and the appropriate administrative procedures to follow. | Develop a manual code by December 31, 2013. | The DNR believes that there are limited situations where invoking this provision is appropriate for regulatory efficiency and to avoid duplication and redundancy where the other DNR program is at least as stringent as storm water requirements. |
| Item 24 - Storm Water: One- and two-family dwellings regulated by the Dept. of Commerce (now DSPS) under s. NR 216.42(9), Wis. Adm. Code. | DNR will withdraw the equivalency concurrence mentioned in the note under s. NR 216.42(9) and have the note revised/deleted. Remove exemption language from s. NR 216.42(9), Wis. Adm. Code | Notify DSPS by December 31, 2012, that DNR is withdrawing its equivalency concurrence. Two to four years. | The DNR will retain permitting authority over one- and two-family dwelling sites where one or more acre of land will be disturbed. |
| Item 25 - Storm Water: Construction sites regulated by an Authorized Local | ALP approval letters will clearly stipulate that permitting | This point forward. | The ALP is modeled after the Federal Qualifying Local Program. The DNR currently has only approved one ALP, Waukesha County. In December 2011, the DNR |

| | | | |
|--|---|--|--|
| Program (ALP) deemed covered under the state construction site storm water permit under s. NR 216.415, Wis. Adm. Code. | <p>authority is retained by the DNR</p> <p>Clarify language in s. NR 216.415, Wis. Adm. Code, about DNR retaining permitting authority.</p> | Two to four years. | provided a copy of the Waukesha Co. ALP approval letter to EPA and is awaiting comment. Until this issue is resolved, the DNR will not approve any additional ALPs. |
| Item 26 - Storm Water: Exclusion for certain MS4 dischargers that are in compliance with an MOU with another state agency under s. NR 216.022, Wis. Adm. Code. | <p>The only current situation that this applies to is the comparable MS4 requirements for WisDOT. To fully rectify, repeal of s. 283.33, Wis. Stat., exemption in s. 30.2022(1) will require a statutory change.</p> <p>Remove s. NR 216.002, Wis. Adm. Code.</p> | <p>Submit recommendation to the legislature in 2013 that s. 283.33 be removed from the list of exemptions. In the meantime, the DNR and the WisDOT will work on administrative and transitional issues in preparation for this change.</p> <p>Two to four years.</p> | <p>The DNR can recommend the appropriate legislation but will have no control over whether a statutory change occurs.</p> <p>If the exemption is repealed by statute, removal of the exemption in the rule will be necessary to avoid confusion. However, a rule change in the absence of a statutory change will not be meaningful.</p> |
| Item 52 - Storm Water: Exclusion of access roads and rail lines from Tier 2 | The DNR will issue guidance that the exclusion only applies | By December 31, 2012. | |

| | | | |
|--|--|---|--|
| industrial category under s. NR 216.21(2)(b), Wis. Adm. Code. | to access roads and rail lines not owned or operated by the permittee. Remove exclusion under s. NR 216.21(2)(b), Wis. Adm. Code. | Two to four years. | |
| Item 53 - Storm Water: No requirement for latitude and longitude submission with "No Exposure Certification" under s. NR 216.21(3)(e)2., Wis. Adm. Code. | Amend NEC form to include the latitude and longitude. Add requirement to NR 216.21(3), Wis. Adm. Code. | By December 31, 2012. Two to four years. | |
| Item 54 - Storm Water: Wisconsin does not include disturbances of less than 1 acre that are part of a common plan of development that disturbs more than one acre under ss. NR 216.42(1) and 216.002(2), Wis. Adm. Code. | The definition of "construction site" under s. NR 216.002(2), Wis. Adm. Code, captures the concept of "common plan of development" consistent with the federal use of the term in its definitions. Consequently, no change or response is necessary. | | |

| | | | |
|--|--|--|--|
| <p>Item 55 - Storm Water: Wisconsin definition of illicit discharge under s. NR 216.002(11), Wis. Adm. Code, exempts more classes of discharges, and therefore, MS4 illicit discharge identification is less comprehensive under s. NR 216.07(3), Wis. Adm. Code.</p> | <p>The DNR believes that the illicit discharge detection and elimination provisions of ch. NR 216 are consistent with federal requirements and accomplish the same goals. Consequently, no change or response is necessary.</p> | | <p>Under 40 CFR 122.34(b)(3)(iii), an MS4 is required to address certain categories of non-storm water discharges or flows <u>only if the MS4 identifies them as significant contributors of pollutants</u>. This section of the federal code then goes on to list the categories, which includes all those identified in the Wisconsin definition under s. NR 216.002(11). Furthermore, s. 216.07(3)(b) requires an MS4 to address these categories of discharges in its illicit discharge strategy if they are identified by the MS4 as significant sources of pollutants to waters of the state. Therefore, the DNR believes that there is no substantive difference between the federal requirements and the DNR's approach.</p> |
| <p>Item 56 - Storm Water: Section NR 216.07(8), Wis. Adm. Code, does not include requirement in MS4 annual report pertaining to notice of reliance on another government entity to satisfy some of the permit requirements.</p> | <p>Section 2.10 of the Wisconsin MS4 general permit addresses cooperation between MS4s or another entity on meeting one or more conditions of the general permit. In addition, the DNR's MS4 annual report form (Form 3400-195), has the following questions:</p> <p>"Has the municipality</p> | | |

| | | | |
|---|--|-----------------------|--|
| | <p>entered into a written agreement with another municipality or a contract with another entity to perform one or more of the conditions of the general permit as provided under Section 2.10 of the general permit?" (Yes or No)</p> <p>"If yes, describe these cooperative efforts:"</p> <p>Therefore, the DNR believes that the information EPA identifies is already captured through the annual reporting process.</p> <p>If necessary, the DNR will add the requirement to NR 216.07(8), Wis. Adm. Code.</p> | Two to four years. | |
| <p>Item 57 - Storm Water: Section NR 216.07(8), Wis. Adm. Code, does not include</p> | <p>The DNR will add a question on proposed changes to the annual</p> | By February 15, 2012. | |

| | | | |
|--|--|--|--|
| requirement in MS4 annual report for proposed changes to the storm water management program. | report form. Add requirement to NR 216.07(8), Wis. Adm. Code. | Two to four years. | |
| Item 67 - Storm Water: Wisconsin rules for small MS4s lack storm water management program evaluation and that records must be available to the public. | <p>The DNR will add a question on program management and assessment to the annual report form.</p> <p>Add program management and assessment requirement to NR 216.07(8), Wis. Adm. Code.</p> <p>Wisconsin has a comprehensive public records law that is set forth in ch. 19 of the Wisconsin Statutes. NR 216 languages need not separately address public records. Consequently, no change or response is necessary on this issue.</p> | <p>By February 15, 2012.</p> <p>Two to four years.</p> | |



RE: DRAFT Milestone Schedule for EPA 75 issues

Nyffeler, Robin T - DNR

to:

Stephen Jann

04/23/2012 09:38 AM

Cc:

Barbara Wester, "Landretti, Jane R - DNR" , "Ohm, Judith M - DNR" , "Lowndes, MaryAnne - DNR" , "Lemcke, Michael D - DNR" , "Biersach, Pamela A - DNR" , "Sylvester, Susan - DNR" , "Mugan, Tom J - DNR" , "Rasmussen, Russell A - DNR"

Hide Details

From: "Nyffeler, Robin T - DNR" <Robin.Nyffeler@Wisconsin.gov> Sort List...

To: Stephen Jann/R5/USEPA/US@EPA,

Cc: Barbara Wester/R5/USEPA/US@EPA, "Landretti, Jane R - DNR"

<Jane.Landretti@wisconsin.gov>, "Ohm, Judith M - DNR" <Judith.Ohm@Wisconsin.gov>,

"Lowndes, MaryAnne - DNR" <MaryAnne.Lowndes@wisconsin.gov>, "Lemcke, Michael

D - DNR" <Michael.Lemcke@Wisconsin.gov>, "Biersach, Pamela A - DNR"

<Pamela.Biersach@Wisconsin.gov>, "Sylvester, Susan - DNR"

<Susan.Sylvester@Wisconsin.gov>, "Mugan, Tom J - DNR"

<Tom.Mugan@Wisconsin.gov>, "Rasmussen, Russell A - DNR"

<Russell.Rasmussen@Wisconsin.gov>

1 Attachment



RuleFlowChart021512_05.ppt

Hi Steve,

I have to meet with Mike and Tom to see if we can tighten up the schedule a bit. Given Wisconsin's rulemaking procedures established in state statutes and established by our Natural Resources Board, however, it is still impossible for the WDNR to have rules promulgated by April 2014. Even given the very best scenario (small package, minimal changes, no controversy, no scheduling delays), it takes a minimum of 31 months to promulgate a rule package. Again, that is a simple rule package with minimal changes and no scheduling conflicts. We will continue to seek legislative changes in the next session to speed up the process and we will continue to move forward with the rule packages as quickly as possible, but we can't change statutorily mandated rule procedures.

Attached is a rule chart outlining our procedures for a simple rule package.

Robin

From: Stephen Jann [mailto:Jann.Stephen@epamail.epa.gov]

Sent: Monday, April 23, 2012 07:31 AM

To: Nyffeler, Robin T - DNR

Cc: Barbara Wester; Landretti, Jane R - DNR; Ohm, Judith M - DNR; Lowndes, MaryAnne - DNR; Lemcke, Michael D - DNR; Biersach, Pamela A - DNR; Sylvester, Susan - DNR; Mugan, Tom J - DNR

Subject: Re: DRAFT Milestone Schedule for EPA 75 issues

Hi Robin. Thanks for providing the draft milestones and schedule for resolving certain of the legal authority issues via amendments to Wisconsin's administrative rules. Thanks, also, for discussing the milestones and schedule during the call on April 4. Kevin and I have discussed the draft with the Water Division Director and Regional Administrator. With the exceptions noted on the call (e.g., exclusion of the analytical

methods and new source issues from the draft rule packages (issues #9 and 27)), we are comfortable with the overall approach set out in your e-mail and attachments. We support your decision to add certain topics to the rulemaking packages (e.g., antibacksliding) in light of the fact that the Legislature did not act on the bill recommendation in the 2012 session.

The proposed schedule extends three years and five months beyond the target for rulemaking that EPA set in its July 2011 letter to Secretary Stepp. EPA took 40 CFR 123.62(e) into account when we set the target. This rule provides that approved NPDES programs which require revision shall be revised within one year unless the State must amend a statute in which case the revision needs to be accomplished within two years. We believe that the draft schedule attached to your message is too long. Please revise the schedule so all rulemakings are completed by April 2014. As discussed, we would like to receive the final milestones and schedule under cover letter from your Secretary (or her Deputy) to the Regional Administrator. Thanks. Steve.

Stephen M. Jann
Chief, Section 2
NPDES Programs Branch (WN-16J)
EPA Region 5
77 W Jackson Blvd
Chicago, IL 60604
(312) 886-2446
jann.stephen@epa.gov

"Nyffeler, Robin T - DNR" ---03/06/2012 03:37:50 PM---You had requested a draft milestones proposal containing a more detailed rule schedule by the first

From: "Nyffeler, Robin T - DNR" <Robin.Nyffeler@Wisconsin.gov>
To: Stephen Jann/R5/USEPA/US@EPA, Barbara Wester/R5/USEPA/US@EPA
Cc: "Sylvester, Susan - DNR" <Susan.Sylvester@Wisconsin.gov>, "Biersach, Pamela A - DNR" <Pamela.Biersach@Wisconsin.gov>, "Mugan, Tom J - DNR" <Tom.Mugan@Wisconsin.gov>, "Lemcke, Michael D - DNR" <Michael.Lemcke@Wisconsin.gov>, "Lowndes, MaryAnne - DNR" <MaryAnne.Lowndes@wisconsin.gov>, "Landretti, Jane R - DNR" <Jane.Landretti@wisconsin.gov>, "Ohm, Judith M - DNR" <Judith.Ohm@Wisconsin.gov>
Date: 03/06/2012 03:37 PM
Subject: DRAFT Milestone Schedule for EPA 75 issues

You had requested a draft milestones proposal containing a more detailed rule schedule by the first week in March. Here is a draft schedule for discussion. The dates were developed based on input from WDNR staff and the new rule making procedures in Wisconsin (WDNR rules also require Natural Resource Board approval at various steps in the process). Please contact Susan Sylvester when you are ready to meet again to discuss this schedule and other issues.

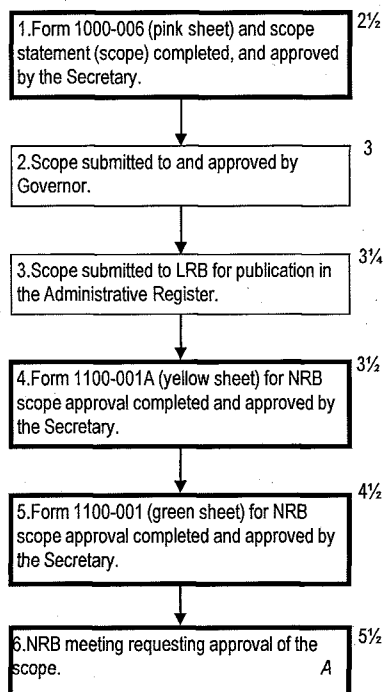
 **Robin T. Nyffeler**
Attorney, Bureau of Legal Services
Wisconsin Department of Natural Resources
(☎) **phone:** (608) 266-0024
(☎) **fax:** (608) 266-6983
(✉) **e-mail:** Robin.Nyffeler@wisconsin.gov

CONFIDENTIALITY: This message may contain information which, by law, is privileged, confidential or exempt from disclosure. Contact the sender for permission prior to disclosing the contents of this message to any other person. This message is intended solely for the use of the addressee. If you are not the addressee, you are hereby notified that any use, distribution or copying of this message is strictly prohibited. If you received this message in error, please notify us by reply e-mail or by telephone and

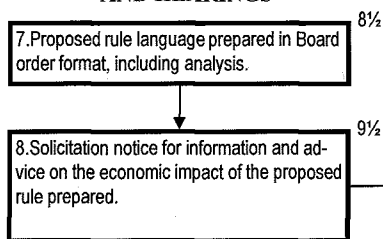
immediately delete this message and any and all of its attachments.

[attachment "75SCHEDULE-DRAFTMILESTONES3-6-12.pdf" deleted by Stephen Jann/R5/USEPA/US]
[attachment "75SCHEDULEstormwaterMILESTONES.pdf" deleted by Stephen Jann/R5/USEPA/US]

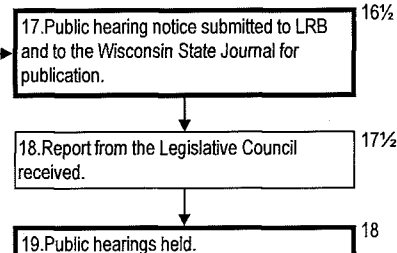
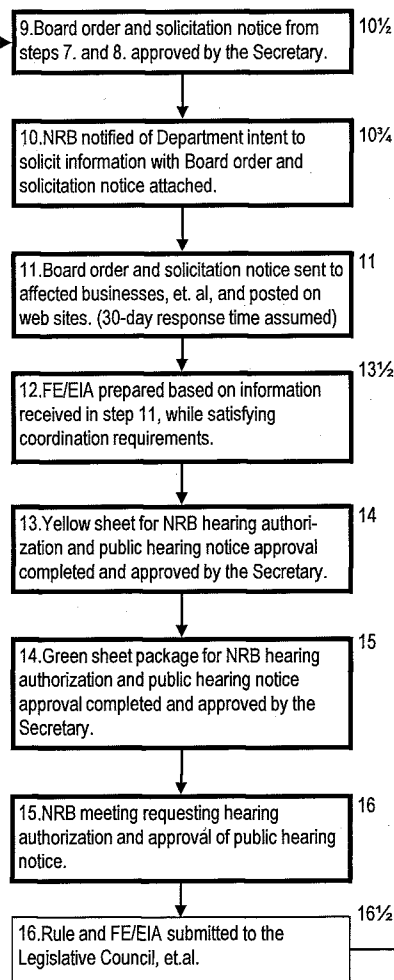
Phase I. INITIATION



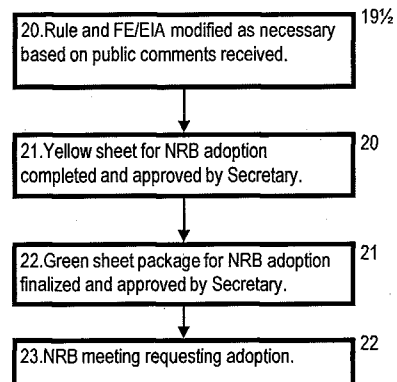
Phase II. RULE DEVELOPMENT AND HEARINGS



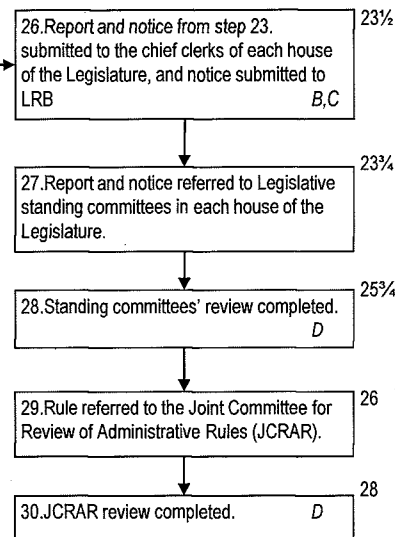
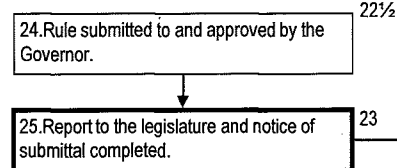
DNR PERMANENT ADMINISTRATIVE RULE PROMULGATION PROCEDURE



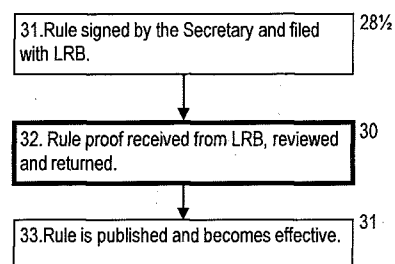
Phase III. RULE ADOPTION



Phase IV. GOVERNOR AND LEGISLATIVE REVIEW



Phase V. Promulgation

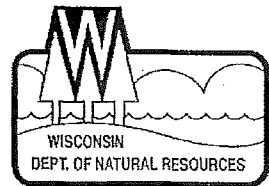


□ Indicates rule drafter responsibility. Number to right of boxes indicates approximate month. Time required may differ significantly for complex or controversial proposals.

A: NRB meeting must be no sooner than the 11th day after publication of the scope statement in the Wisconsin Register.
 B: If FE/EIA implementation and compliance costs exceed \$20,000,000, DOA Secretary approval and report must be received prior to submittal to chief clerks.
 C: Receipt by the chief clerks after the last day of the final general business floor period (typically in March of even numbered years) will be considered received on the 1st day of the next general session, unless the presiding officers of each house direct referral to committees.
 D: Time shown assumes a hearing is held or a briefing is requested by the committee. Subtract 1 month if neither happens. Additional time will be required if modifications are requested or other committee actions are taken.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
101 S. Webster Street
Box 7921
Madison WI 53707-7921

Scott Walker, Governor
Cathy Stepp, Secretary
Telephone 608-266-2621
Toll Free 1-888-936-7463
TTY Access via relay - 711



May 18, 2012

Susan Hedman, Region V Administrator
United States Environmental Agency
77 West Jackson Boulevard
Chicago IL 60604-3590

Subject: Rule Making Schedule for EPA's Permitting for Environmental Results Initiative

Dear Dr. Hedman:

My letter of October 14, 2011 provided a plan of action in response to your letter dated July 18, 2011 that identified 75 issues relating to Wisconsin's legal authority to administer its National Pollutant Discharge Elimination System (NPDES) approved program. During subsequent discussions with the Department of Natural Resources staff, EPA requested that the Department provide a more specific timeline with milestones for the rulemaking component of our plan. The attached document provides our projected timeline and milestones for eight rule packages and includes other actions that we believe will satisfy the needs of both EPA and the Department.

We recognize that EPA would like rule changes to be completed within a two year timeframe, however, the Department's current rulemaking procedures from start to finish take a minimum of 31 months. Accordingly, Department staff will proceed with rulemaking as expediently as possible and will strive to complete rules earlier than projected, but a two year time frame simply cannot be met under existing state rulemaking procedures. The Department is, however, willing to resolve some of the issues more quickly through an Addendum to the Memorandum of Agreement to administer the WPDES Permit program if EPA would like to pursue this action. Also, EPA has already received an Attorney General's Statement from Wisconsin which resolved a number of issues.

It should be noted that rule packages #1, #2 and #3 and #8 were already in progress when DNR received EPA's July 2011 letter. Therefore those packages are projected to be completed earlier than the others. The dates for some of the other packages are staggered to provide staff sufficient time to draft rules, balance permit workloads and allow for adequate public participation and consultation from EPA.

In summary, the Department is proceeding to make rule changes as quickly as possible. We look forward to continuing to work cooperatively with EPA and will provide biannual updates on our progress.

Sincerely,

Cathy Stepp
for Cathy Stepp
Secretary

Attachment

MILESTONES FOR ADDITIONAL ACTIONS ON EPA 75

(5/16/2012)

I. RULE MAKING SCHEDULES:

Rule Package 1 - Sanitary Sewer Overflows (SSOs) & Bypassing

Federal Issue: Issue # 1 (SSOs)

Rulemaking Schedule for RP 1:

- **Rule Draft Completed** – December 2011
- **NRB Authorization for Hearing** – January 2012
- **EIA Process Completed** – May 2012
- **Public Hearings** – August 2012
- **NRB Adoption** – October 2012
- **Submit Rule for Legislative Review** – January 2013
- **Effective** – After completion of Legislative review

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 2 – Pretreatment

Federal Issues: Issue # 16 (Pretreatment)

Rulemaking Schedule for RP 2:

- **Rule Draft Completed and EIA Process Completed** – October 2012
- **NRB Authorization for Hearing** – December 2012
- **Public Hearings** – March 2013
- **NRB Adoption** – May 2013
- **Submit Rule to Legislature** – July 2013
- **Effective Date** – After completion of legislative review process

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 3 – NR 106 Issues and Some Great Lakes Initiative (GLI) Issues

Federal Issues:

- **Issue # 8 Mercury Reasonable Potential**
- **Issue # 10 (Intake Pollutants)**
- **Issue # 17 Noncontact Cooling Water Exemption Issue # 71**
- **Mixing Zone Phase out for Bioaccumulative Chemicals of Concern (BCCs)**

Rulemaking Schedule for RP 3:

- Rule Draft Completed and EIA Process Completed – November 2012
- NRB Authorization for Hearing – January 2013
- Public Hearings – May 2013
- NRB Adoption – September 2013
- Submit Rule to Legislature – November 2013
- Effective Date – After completion of legislative review process

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 4 – Additional NR 106 Issue:

Federal Issues:

- Issue # 28 (Acute limits = FAV)
- Issue # 32 Tier II Value Compliance Schedule Provision
- Issues #31, 35, 36, 37 and 38 (Ammonia)
- Issues # 2, 30, 34, 41 (Expression of Limits)
- Issues #39 - 43 (Chloride)
- Issue # 70 (Alternative Limit When Results Cannot Be Quantified)
- Issue # 10 and #74 Regarding Whole Effluent Toxicity Reasonable Potential (WET R.P.) and Other WET issues and
- Issue # 10 TMDL Procedures for Discharges in the Great Lakes Basin

Rulemaking Schedule for RP 4:

- Scoping Statement to Governor – May 2012
- Approval from Governor to proceed – May 2012
- Scope Statement Submitted to NRB for Approval – June 2012
- Rule Draft Completed and EIA Process Completed – December 2013
- NRB Authorization for Hearing – February 2014
- Public Hearings – April 2014
- NRB Adoption – August 2014
- Submit Rule to Governor – September 2014
- Written Approval from Governor – November 2014
- Submit Rule to Legislature for review– January 2015
- Effective Date – After completion of legislative review process

Rule Package 5 – NR 200, NR 205, NR 220 - Technology Based Limit Issues, New Source Performance Standards (NSPS), Expression of Limits Generally, Mass limits, Generic Reasonable Potential, Pollutants in the Intake for Technology Based Limits, BMP limits, General Compliance Schedule provisions, Waters of the

State (note to definition), Permit application requirements for Industrial groups, Intake requirements for new facilities (316(b)):

Federal Issues:

- Issue # 2 (122.45 (a) and (h), (b)(1), (c), (d), (f) and (g), (i))
- Issue # 7 (NSPS)
- Issue #11 (Generic RP)
- Issue #13 (Best Management Practice (BMP) authority)
- Issue # 14 (Antibacksliding)
- Issue #15 (General Compliance Schedule language)
- Issue # 20 (Adjustment to Technology Limits)
- Issue # 29 (Solid Waste Leachate Provision in Compliance Schedules)
- Issue # 46 (Expedited Variance for Technology Based Limits))
- Issue # 61 (Application Requirements for Certain Classified Groups)
- Issue 14 (Antibacksliding)

Rulemaking Schedule for RP 5:

- **Scoping Statement to Governor – May 2012**
 - **Approval from Governor to proceed – May 2012**
 - **Scope Statement Submitted to NRB for Approval – June 2012**
 - **Rule Draft Completed and EIA Process Completed – April 2014**
 - **NRB Authorization for Hearing – July 2014**
 - **Public Hearings – October 2014**
 - **NRB Adoption – January 2015**
 - **Submit Rule to Governor – February 2015**
 - **Written Approval from Governor – April 2015**
 - **Rule to Legislature for review – June 2015**
 - **Effective Date – After completion of legislative review process**
-

Rule Package 6 – Permit Processing Issues and other Permit Issuance Procedural Matters

Federal Issues:

- Issue 3 (Process for citizens to request permit modifications)
- Issue 18 (Signatures of Permit Applications)
- Issue 21 and 66 (Fact Sheets)
- Issue 22 (Sending Draft Permits to Agencies)
- Issue 45 (Permits Not a Property Interest, Permit Shield Provisions)
- Issues 47 (Signatory to Permit)
- Issue 48 and 50 (Termination of Permit Procedures)
- Issue 49 (Notification of Permit Changes)
- Issue 51(Public Info Hearing Procedures Requests)
- Issue 62 (Suspension of Permits)
- Issue 65 (Preparation of Draft Permit Required)

Rulemaking Schedule for RP 6:

- Scoping Statement to Governor – May 2012
 - Approval from Governor to proceed – May 2012
 - Scope Statement Submitted to NRB for Approval – June 2012
 - Rule Draft Completed and EIA Process Completed – December 2013
 - NRB Authorization for Hearing – January 2014
 - Public Hearings – March 2014
 - NRB Adoption – June 2014
 - Submit Rule to Governor – July 2014
 - Written Approval from Governor – September 2014
 - Submit Rule to Legislature for review – January 2015
 - Effective Date – After completion of legislative review process
-

Rule Package 7 – Analytical Test Methods

Federal Issues: Issue 9 (Analytical Test Methods)

Rulemaking Schedule for RP 7:

- Scoping Statement to Governor – May 2012
 - Approval from Governor to proceed – May 2012
 - Scope Statement Submitted to NRB for Approval – June 2012
 - Rule Draft Completed and EIA Process Completed – December 2013
 - NRB Authorization for Hearing – February 2014
 - Public Hearings – April 2014
 - NRB Adoption – June 2014
 - Submit Rule to Governor – July 2014
 - Written Approval from Governor- September 2014
 - Submit Rule to Legislature for review- January 2015
 - Effective Date – After completion of legislative review process
-

Rule Package 8 – Storm water Rule Revisions

Federal Issues: Issues # 23, 24, 25, 26, 52, 53, 57 and 67 (see notes below)

Rulemaking Schedule for RP 8:

- Rule Draft Completed and EIA Process Completed – December 2013
- NRB Authorization for Hearing – January 2014
- Public Hearings – August 2014
- NRB Adoption – October 2014
- Submit Rule to Legislature – January 2015
- Effective Date – After completion of legislative review process

Note # 1: The scope statement for RP 8 was published prior to June 8, 2011 so Governor approval is not required and is therefore not included in the schedule. This scope statement included changes to ch. NR 216 for consistency with federal regulations, and will address low priority or minor storm water issues raised in EPA's letter

Note# 2: For issue # 24 regarding construction site storm water permit coverage of commercial building sites and one and two family dwellings, the Department will seek removal of the note in NR 216.42(9) by January 2013 and will no longer deem the DSPS program as equivalent. In addition, DNR will continue to act as permitting authority for commercial building construction sites and will not deem the DSPS program as equivalent under s. NR 216.42(4). In January 2013, the state will seek a legislative change to clarify permitting authority, and in January 2014, submit proposed manual code changes for EPA approval - see II and III below.

II. STATUTORY CHANGES:

Statutory Changes Regarding Storm water– WisDOT permitting exemption

Federal Issue: Issue # 23 & 26 (DOT)

Proposed Schedule:

- Begin administrative and transitional measures – March 2012
- Submit legislative change recommendation– January 2013

Statutory Change Regarding Storm water – Commercial building regulation

Federal Issue: Issue # 24 (DSPS)

Proposed Schedule:

- DNR will continue permitting – Continuously
- Submit legislative change recommendation– January 2013

Other Statutory Change Regarding NPDES Program Issues

Federal Issues: Issues # 6, 27, 48 and 50

Statutory changes were already enacted to establish terminology consistent with federal regulations (e.g. "termination, revocation and reissuance and modification"). This addresses part of issues 48 and 50.

Statutory changes will again be requested by January 2013 to address EPA's comments on Issues 6 and 27. As part of this statutory request, the Department may also request additional statutory changes that were already covered by the Attorney General's Statement simply for clarification purposes. The Department may also request that other issues included in the rule making packages above be addressed through statutory changes so they can be resolved more quickly.

III. OTHER ACTIONS:

A. Manual Code Change Recommendation Schedules:

Manual Code Change -- Other environmental programs, ss. NR 216.21(4) and NR 216.42(6)

Federal Issue: Issue # 24 Storm water

Proposed Schedule:

- DNR to develop manual code-- December 2013
- Seek EPA approval -- January 2014

B. Communication Change Schedules (Completed):

Approval Letter Change 1 -- Authorized Local Storm water Programs

Federal Issue: Issue # 25 (ALPs)

Proposed Schedule:

- Approvals clearly stipulating DNR as permitting authority -- March 2012 and forward

C. Memorandum Of Agreement Addendum:

Some of the issues included in rule making packages may be resolved more quickly through an Addendum to the MOA between EPA and DNR.



Three Issues on the Wisconsin's Attorney General's Statement (Judicial Review)

Nyffeler, Robin T - DNR

to:

Barbara Wester

05/21/2012 12:00 PM

Cc:

"Sylvester, Susan - DNR", "Mugan, Tom J - DNR", "Lemcke, Michael D - DNR",

"Dawson, Thomas J - DOJ"

Hide Details

From: "Nyffeler, Robin T - DNR" <Robin.Nyffeler@Wisconsin.gov>

To: Barbara Wester/R5/USEPA/US@EPA,

Cc: "Sylvester, Susan - DNR" <Susan.Sylvester@Wisconsin.gov>, "Mugan, Tom J - DNR"

<Tom.Mugan@Wisconsin.gov>, "Lemcke, Michael D - DNR"

<Michael.Lemcke@Wisconsin.gov>, "Dawson, Thomas J - DOJ"

<DawsonTJ@DOJ.STATE.WI.US>

2 Attachments



Petition for JR.pdf 20110817151911999.pdf

Hi Barbara,

A few weeks ago, you asked me to provide additional information regarding the Attorney General's Statement dated January 19, 2012 on three issues: Right to judicial review (issue # 5), Public Participation in Enforcement Cases (Issue #64) and the *Andersen* decision. I am sending you information on the right to judicial review in this e-mail message.

Right to seek judicial review - Issue # 5: You asked for clarification as to whether an individual citizen can directly seek judicial review under s. 227.52, Stats., regarding the terms and conditions of a WPDES permit even if the person hasn't first filed a contested case hearing petition under s. 283.63, Stats. I told you that my reading of the Attorney General's Statement (as well as the Department's interpretation) was that filing a contested case hearing petition under s. 283.63, Stats., was not a prerequisite for filing a petition for judicial review by an individual regarding the terms of a WPDES permit. However, a permittee, or 5 or more persons acting as a group, must file a s. 283.63, Stats. petition along with the petition for judicial review in order to challenge the terms and conditions of a WPDES permit.

You also requested an example where the state allowed an individual to directly challenge the terms and conditions of a permit through judicial review under s. 227.52, Stats. The example case is *Pulera v. WDNR* Case No. 11-CV-1151 filed in Walworth County. Attached is the petition and the state's Statement of Position filed with the court. The state accepted the judicial review petition even though the individual did not file a separate s. 283.63, Stats., contested case hearing petition seeking administrative review of the terms and conditions of the permit. You may notice that the petitioner referenced s. 283.63, Stats, in the judicial review petition, but s. 283.63, Stats, petitions are not filed in circuit court so that statutory cite in the judicial petition isn't applicable. The petitioner and the CAFO owner (permittee) reached an agreement that resolved the matter so the case was eventually dismissed.

Let me know if you need anything further on this issue. I will send additional information to you regarding the *Andersen* decision in a separate e-mail message. Did you still need additional information on issue # 64 involving the right to intervene in an enforcement case?



Robin T. Nyffeler

Attorney, Bureau of Legal Services

Wisconsin Department of Natural Resources

(☎) phone: (608) 266-0024

(☎) fax: (608) 266-6983
(✉) e-mail: Robin.Nyffeler@wisconsin.gov

CONFIDENTIALITY: This message may contain information which, by law, is privileged, confidential or exempt from disclosure. Contact the sender for permission prior to disclosing the contents of this message to any other person.

This message is intended solely for the use of the addressee. If you are not the addressee, you are hereby notified that any use, distribution or copying of this message is strictly prohibited. If you received this message in error, please notify us by reply e-mail or by telephone and immediately delete this message and any and all of its attachments.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH _____

WALWORTH COUNTY

MARGARET L. PULERA, M.D.
W9539 McFarlane Road
Darien, WI 53114-1208

Petitioner

Case No. **11 CV 01151**

vs.

Classification Code: 30607

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES
101 South Webster Street
Madison, WI 53703

Respondent

FILED
CIRCUIT COURT

JUL 28 2011

Clerk of Courts-Walworth Co.
By: Elizabeth Cheverle

PETITION FOR JUDICIAL REVIEW OF

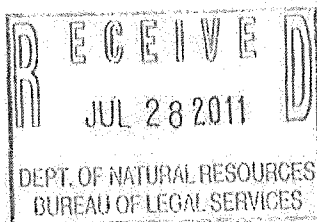
Hon. John R. Race

WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM (WPDES)

PERMIT No. WI-0064807-01-0

Petitioner, Margaret L. Pulera, M.D., on my own behalf, hereby files this PETITION FOR JUDICIAL REVIEW of the final Decision regarding the WPDES Permit (No. WI-0064807-01-0) for the proposed Rock Prairie Dairy to Respondent, Wisconsin Department of Natural Resources. A copy of the Decision is attached as **Exhibit A**. I am requesting Judicial Review pursuant to State Statutes 227.52, 227.53, and 283.63 (2).

The proposed Rock Prairie Dairy, under construction now, is located in Bradford Township, Rock County, Wisconsin at the northeast corner of S. Scharine Road and State Highway 14, Avalon, Wisconsin 53505. The proposed Dairy is to have 5,200 dairy cows housed on 124 acres of concrete on a 160 acre parcel. The proposed Dairy owns no land to spread



RECEIVED

JUL 28 2011

DNR
OFFICE OF THE
SECRETARY

Hand
Carry
1:51pm
H.S.

manure. All spreading fields for manure generated are entirely on leased land, 5,172 acres of actual spreading area.

The nature of my interest is: my family and I live two miles from the proposed Rock Prairie Dairy. We are ¼ mile from the spreading fields. My well is over the same critical recharge aquifer that the proposed Dairy and the spreading fields sit over. I come from a farm family and have lived in this area (on the prairie) my entire life, except for a period of studying at Universities and in post-graduate training at hospitals. My family continues to farm on the prairie as a 5th generation farm family.

Petitioner, as a child, made many school and family trips to the banks of Turtle Creek. As an adult, she did the same with her children. And hopes to do similarly with future grandchildren.

STATEMENT OF FACTS

1. Petitioner is an adult resident of the State of Wisconsin, residing at W9539 McFarlane Road, Darien, Wisconsin 53114-1208.

2. Petitioner lives in Walworth County; therefore, pursuant to Wisconsin Statue 227.53(1) (a) (3), Walworth County is the proper venue for this Review.

3. The proposed Rock Prairie Dairy with 5,200 cows will generate 73,753,578 gallons of liquid manure and wastewater each year and 10,000 tons of manure solids each year. Petitioner has spreading fields north, south, and west of her farm (home).

4. This will be one of the largest manure waste systems in the State of Wisconsin. The waste storage system will have a useable capacity of over 80,000,000 gallons. Two of the lagoons will be nearly 30,000,000 gallons each.

5. The WPDES is a water quality issue Permit. However, serious health risks to the public must be considered. To ignore public health is a serious omission.

The Preamble to the Constitution of the State of Wisconsin states:

“We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility and *promote the general welfare*, do establish this constitution.”

The DNR Mission Statement states:

“Our Mission ...
To protect and enhance our natural resources and
To provide a healthy sustainable environment
And to consider the future and generations to follow.”

The Rock County Health Department did a Health Impact Assessment of the proposed Rock Prairie Dairy and issued a Report in May, 2011.

Quoting from page 29 from the Report:

“Considering sheer size and anticipated manure production of the proposed Rock Prairie Dairy, there is little doubt of the significant potential for negative impacts on the environment and *public health*.”

“The fact that the operation is still in the planning stage along with the uncertainty of predicting impacts from CAFOs means post-production analysis is critical to understanding the impacts of the Rock Prairie Dairy. Ongoing measuring of quantifiable environmental and health indicators is strongly recommended. Just as important, is the need for the Rock Prairie Dairy to ensure that mitigation strategies are followed, maintained and adjusted when warranted. “

6. The proposed Dairy is sitting in the Turtle Creek Watershed. Turtle Creek is an Impaired Waterway. It exceeds the Federal Clean Water Act standard of 0.075 mg/liter of phosphorus. Non-point run-off from farm fields is the major source of phosphorous pollution to Turtle Creek and Blackhawk Creek. (Article by Lisa Gaumnitz entitled “Less P (Phosphorous) is Key” in Wisconsin Natural Resources Magazine, August 2010, pages 4-9.)

The manure spreading fields of the proposed Dairy are in the Turtle Creek and Blackhawk Creek watersheds.

Both Turtle Creek and Blackhawk Creek flow into the Rock River, which is the 12th most-polluted river in the nation.

Kevin Kirsch (Watershed Management) of the Wisconsin Department of Natural Resources has prepared a Maximum Load Document for the Lower Rock River Basin. The proposed mega-dairy sits in the Lower Rock River Basin.

7. Climate data (from the Wisconsin Institute on Climate Change Impacts) show that annual precipitation in Wisconsin increased by 10% in the second half of the twentieth century. The Wisconsin Institute on Climate Change Impacts predicts that there will be many more heavy rainfalls for the State of Wisconsin through 2055, and that southern Wisconsin will continue to become wetter.

8. The Dairy will have four lagoons, in what will be one of the largest waste storage lagoon systems in the State of Wisconsin. Two of the lagoons will be nearly 30,000,000 gallons each, *the bottoms of which will be only three feet from the water table*. This is shown on the construction drawings submitted by the WPDES Permit applicant.

9. The proposed Dairy is sitting directly over a critical recharge aquifer. The manure spreading fields of the dairy are over the critical recharge aquifer. Rock County, Wisconsin has many shallow aquifers throughout the county. This critical recharge aquifer is unique, because it is deep and is one of only two in Rock County. It also has subsurface material that has poor attenuation of pollutants, allowing them to go directly into the aquifer, and to pollute the entire aquifer. This aquifer supplies all the private wells running north and south, east and west, as well as the City of Janesville.

10. The Wisconsin Department of Natural Resources Environmental Analysis of the proposed Rock Prairie Dairy states under "Groundwater":

"There is a significant probability that any nitrogen that does not get taken up by crops will reach surface water and groundwater."

This means we will also be getting pathogens from the manure into surface waters and ground water.

I do not and have never had nitrates in my well water, and do not want them in my water supply.

11. Randy Thompson of the Rock County UW Extension states that on a hot day, a cow drinks 40 gallons of water. Given the cows will be milked three times a day, he said this applies through all seasons. Thus, 5,200 cows will drink 208,000 gallons of water per

day. The WPDES Permit application of the proposed Dairy states fresh water usage at 175,000 gallons of water per day - not even enough for the cows' drinking water.

12. The Nutrient Management Plan is geared towards maximum crop yields rather than protection of groundwater quality.

The Environmental Assessment for a General WPDES Permit for Large CAFOs Environmental Analysis process, April, 2011, Page10 says:

“Under DNR rules, a producer regulated under a WPDES permit under Chapter NR 243, Wis. Adm. Code, must have a nutrient management plan. Nutrient applications can be calculated by hand or using *Snap plus* software (<http://www.snapplus.net/>) developed by the UW Madison, Soil Science Department. Snap plus software uses the most current UWEX application rate guidelines. The default value in Snap Plus is equal to the recommended rate needed to maximize yield not protect groundwater. Recommended rates are based on UWEX publication A2809 (DATCP, 1998).”

The Snap Plus computer program research team (Wisconsin Buffer Initiative) is presently working on a method to identify fields where potassium and soil losses have an unacceptable water quality impact. As the Snap Plus computer program now calculates and as it was used in the Nutrient Management Plan for this WPDES application, these fields could not be identified. And, thus, the total impact on water quality could not be recognized.

13. The Snap Plus program evaluates the amount of fertilizer that goes on the land based on the price of corn and nitrogen. A program that uses fluctuating corn and nitrogen prices is not geared toward protection of water quality.

14. Natural Resources Conservation Service Conservation Practice Standard on Waste Storage Facility (No.) Code 313 on the construction of lagoons does not address the construction of 30,000,000 gallon lagoons. It is up to the wastewater engineer to design them as best as he can according to Code 313 and State Statute NR 213.

GROUND FOR REVIEW AND RELIEF SOUGHT

DNR's Decision is subject to Judicial Review as provided in State Statutes 283.63 (2) and 227.52 to 227.58.

I am asking for review and consideration to modify the Permit as follows:

(1) Given the enormity of waste (74,000,000 gallons of liquid manure and 10,000 tons of solid manure), a 200 foot setback from all private wells is requested, instead of a 100 foot setback.

(2) Covers on all four lagoons, not just three of them. The original application from the applicant had covers on all four lagoons. No explanation was given in the final Decision of the WPDES Permit as to why one cover was taken off.

(3) Given the proposed Dairy is over a critical recharge aquifer and the site is in an area of poor attenuation of pollutants, as well as being in the Turtle Creek Watershed, all Monitoring Wells at the facility should be tested minimally once per month, instead of every three months. It is clear that the DNR still does not understand the importance of

this unique, deep critical recharge aquifer and its susceptibility to being easily polluted.

This is the only source of fresh water for all of us, east and west, north and south, as well as the City of Janesville.

(4) And there should be at least one Monitoring Well down gradient from the lagoons inside the facility area. (At this time the four Monitoring Wells and one piezometer (measures fluid pressures) are on the perimeter of the site.) The site should have at least one rain gauge in an open area.

(5) The DNR states under "Discharge Prevention" in the WPDES Permit for the proposed Rock Prairie Dairy only generalities. The same goes for "Runoff Control Systems." Doing the above relief measures would help ensure zero discharge from the production site, which the Permit requires.

Given the prediction of increased precipitation from heavy rainfalls (from the Wisconsin Institute on Climate Change Impacts), the impact of storm water runoff from the millions of gallons of manure that will be spread on the fields located within the watersheds has not been evaluated and should be.

(6) Given the enormity of the waste and the untenability of leased acreage, the Permit should require more spreading acres, or decrease the number of animals coming in.

(7) The conclusions of the Rock County Health Impact Assessment Report for the proposed Rock Prairie Dairy should be part of the requirements of the WPDES Permit.

(8) I request an independent, peer-reviewed reevaluation of the construction design of the two large (30,000,000 gallon) lagoons for the proposed Rock Prairie Dairy, given there are no standards in place in the State of Wisconsin for the design of such large lagoons.

The two 30,000,000 gallon lagoons will be only three feet from the water table, which is part of the unique critical recharge aquifer as discussed above. Note – the data from the Wisconsin Institute on Climate Change Impacts shows that we will have more annual precipitation in the years ahead. This means the water table level will rise, thus making it even closer to the bottom of the lagoons. We need to understand the potential of how the increased precipitation will challenge the structural integrity of the bottom of the lagoons.

(9) Given the DNR has stated that it is inevitable that nitrogen will get into ground and surface waters (see point 10 under “Statements of Fact”), what can be done with the Nutrient Management Plan to assure that this does not happen? This would also build in some protection from the pathogens in the manure from polluting surface and groundwater.

(10) The fresh water usage is woefully underestimated. This has not been adequately addressed. The two high capacity wells, already dug, are capable of drawing 1,728,000 gallons of fresh water / day. The 175,000 gallons / day of total fresh water usage, cited in the Permit, do not even cover the daily drinking requirements of the animals on site.

(11) The Snap Plus computer program as used now by the DNR to evaluate Nutrient Management Plans needs an independent review (outside the University of Wisconsin Soils Department) as to how much water quality protection it actually provides.


(12) Issue the WPDES Permit for three years, not five. There are too many unknowns at this time. No Environmental Impact Statement was ever done and should have been done.

(13) Given we will be adding 5,200 cows to the area that is the Rock River Basin, Kevin Kirsch (Watershed Management) of the Wisconsin Department of Natural Resources should prepare a maximum load analysis of how much additional phosphorous will be going into the Basin, which pours into Black Hawk and Turtle Creeks and then into the Rock River. We should evaluate first what the additional manure from 5,200 cows is going to add as a pollutant to these streams.

(14) To control the amount of nitrogen going into ground water and surface water, an operation of this size should require sampling and analysis of each manure application. Analysis of manure from each source should be done much more frequently. (Smaller CAFOs test each source twice per month when emptying lagoons.)

Dated this 28th day of July, 2011.

Respectfully submitted,


Margaret L. Pulera, M.D., Petitioner

Cc: Attorney Jordan J. Hemaïdan on behalf of Todd Tuls for the proposed Rock Prairie Dairy
via United States Postal Service Certified Mail on 28th Day on July, 2011

Address:
W9529 McFarlane Road
Darien, Wisconsin 53114-1208
(608)-883-6712

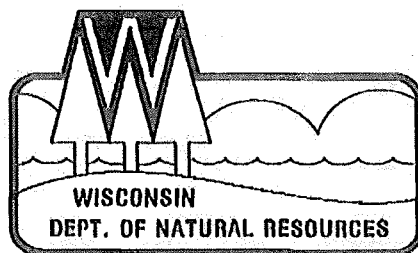


Exhibit A

WPDES PERMIT

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
**PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE
ELIMINATION SYSTEM**

Rock Prairie Dairy LLC

is permitted, under the authority of Chapter 283, Wisconsin Statutes, to manage and utilize manure from a livestock facility located at

S. Scharine Rd & State Hwy 14, SEQ Section 2 T2N R14E, Bradford Township, Rock County
to

**Ground and Surface Waters in the Turtle Creek and Blackhawk Creek Watersheds, tributaries to the Lower
Rock River Drainage Basin**

in accordance with the effluent limitations, monitoring requirements and other conditions set
forth in this permit.

The permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date an application shall be filed for reissuance of this permit, according to Chapter NR 200, Wis. Adm. Code, at least 180 days prior to the expiration date given below.

State of Wisconsin Department of Natural Resources
For the Secretary

By


Susan G. Josheff
Acting South Central Region Water Leader

6-30-2011
Date Permit Signed/Issued

PERMIT TERM: EFFECTIVE DATE - July 01, 2011

EXPIRATION DATE - June 30, 2016



Margaret L. Pulera, M.D.
W9539 McFarlane Road
Darien, WI 53114-1208

Secretary Stepp
Wisconsin DNR
101 S. Webster Street
Box 7921
Madison, WI 53707-7921

U R G E N T

Delivery Immediately



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Lorraine C. Stoltzfus
Assistant Attorney General
608/266-9226
FAX 608/266-2250

August 17, 2011

Ms. Sheila Reiff
Clerk of Circuit Court
Walworth County Circuit Court
Judicial Center
1800 County Road NN
Post Office Box 1001
Elkhorn, WI 23121-1001

Re: *Margaret L. Pulera, M.D. v. Wisconsin Department of Natural Resources*
Walworth County Case No. 11-CV-1151

Dear Ms. Reiff:

I represent the respondent, Wisconsin Department of Natural Resources, in this matter. Please find enclosed for filing the respondent's Notice of Appearance and Statement of Position. A copy of this pleading has been served by mail today upon the petitioner.

To acknowledge filing, please date-stamp the additional copy of the notice of appearance and statement of position, and return it to me in the stamped, addressed envelope enclosed. Thank you.

Sincerely,

Lorraine C. Stoltzfus
Assistant Attorney General

LCS:msu

Enclosures

c w/enc.: Margaret L. Pulera, M.D.
Attorney Jordan J. Hemaidan
Attorney Robin Nyffeler

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 3

WALWORTH COUNTY

MARGARET L. PULERA, M.D.,

Petitioner,

v.

Case No. 11-CV-1151

Administrative Agency Review: 30607

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent.

NOTICE OF APPEARANCE AND STATEMENT OF POSITION

The respondent Wisconsin Department of Natural Resources (WDNR) appears in this matter by its attorneys, Attorney General J.B. Van Hollen and Assistant Attorney General Lorraine C. Stoltzfus, and as its position and in response to the petition for judicial review of a WDNR decision, states as follows:

Introduction

· ADMITS the general statements of fact in the second paragraph of the petitioner's introduction, except DENIES that there will be 124 acres of concrete.

Lacks information sufficient to admit or deny the statements made in the third and fourth paragraphs of the petitioner's introduction.

Statement of Facts

1. Lacks information sufficient to admit or deny the allegations of paragraph 1.
2. ADMITS that if petitioner lives in Walworth County, then Walworth County is the proper venue for the action.
3. ADMITS the first sentence of paragraph 3. Lacks information sufficient to admit or deny the allegations of the second sentence of paragraph 3.
4. ADMITS the allegations of paragraph 4.
5. a) As to the first three sentences of paragraph 5, AFFIRMATIVELY ALLEGES that the law that applies to all WPDES permits speaks for itself; DENIES any interpretation by petitioner of the law applicable to WPDES permits other than that pursuant to Wisconsin law.

b) ADMITS that the preamble to the Wisconsin Constitution and the excerpt from the WDNR Mission Statement are accurately quoted, except ALLEGES that the petitioner added the emphasis to the quotes and ALLEGES that the mission statement is not quoted in its entirety; DENIES any interpretation by petitioner of these quotations other than that pursuant to Wisconsin law.

c) ADMITS that the Rock County Health Department issued the referenced report; ADMITS that the excerpt from that report is accurately quoted, except ALLEGES that the petitioner added the emphasis to the quote; DENIES any interpretation by petitioner of that excerpt other than that pursuant to Wisconsin law.

d) DENIES any allegations of paragraph 5 that are not expressly admitted.

6. a) ADMITS the first sentence. Second sentence—ADMITS that Turtle Creek is at least partially impaired. Lacks information sufficient to admit or deny the remaining allegations of the first paragraph of paragraph 6.

b) ADMITS the second paragraph of paragraph 6—the manure spreading fields are in the referenced watersheds.

c) ADMITS the first clause of the third paragraph of paragraph 6—the referenced creeks flow into the Rock River; lacks information sufficient to admit or deny the national pollution ranking of the Rock River.

d) As to the first sentence of the fourth paragraph of paragraph 6, AFFIRMATIVELY ALLEGES that the total maximum daily load for the Rock River basin is not complete; ADMITS that Rock Prairie Dairy is located in the Lower Rock River Basin.

e) DENIES any allegations of paragraph 6 that are not expressly admitted.

7. ADMITS the general proposition that research data shows that Wisconsin is experiencing greater rainfall intensities; AFFIRMATIVELY ALLEGES that this was taken into account in the permit conditions, and that there is sufficient manure storage capacity to prevent spills; DENIES any allegations of paragraph 7 that are not expressly admitted.

8. ADMITS the first sentence of paragraph 8; DENIES that the bottoms of the lagoons will be only three feet from the water table; AFFIRMATIVELY ALLEGES that the construction drawings speak for themselves; DENIES any allegations of paragraph 8 that are not expressly admitted.

9. ADMITS that the proposed dairy and land spreading fields are located within an aquifer recharge area; AFFIRMATIVELY ALLEGES that the aquifer maps of Rock County speak for themselves; DENIES any allegations of paragraph 9 that are not expressly admitted.

10. ADMITS that the excerpt from the Rock Prairie Dairy Environmental Assessment in paragraph 10 is accurately quoted; DENIES any interpretation by petitioner of that excerpt other than that pursuant to Wisconsin law; lacks information sufficient to admit or deny the conditions of petitioner's well; DENIES any allegations of paragraph 10 that are not expressly admitted.

11. Lacks information sufficient to admit or deny the alleged statements of Randy Thompson; DENIES that the WPDES permit application is inaccurate; DENIES any allegations of paragraph 11 that are not expressly admitted.

12. a) AFFIRMATIVELY ALLEGES that the Nutrient Management Plan speaks for itself; DENIES any interpretation by petitioner of the plan other than that pursuant to Wisconsin law.

b) ADMITS that the excerpt from the Environmental Assessment in paragraph 12 is accurately quoted, except ALLEGES that the petitioner added the emphasis to the quote; DENIES any interpretation by petitioner of that excerpt other than that pursuant to Wisconsin law.

c) As to the third paragraph of paragraph 12, AFFIRMATIVELY ALLEGES that the Snap Plus computer program speaks for itself; DENIES any interpretation of the application and meaning of the program other than that pursuant to Wisconsin law.

d) DENIES any allegations of paragraph 12 that are not expressly admitted.

13. AFFIRMATIVELY ALLEGES that the Snap Plus computer program speaks for itself; DENIES any interpretation of the application and meaning of the program other than that pursuant to Wisconsin law; DENIES the remaining allegations of paragraph 13.

14. AFFIRMATIVELY ALLEGES that the cited NRCS Practice Standard Code 313 speaks for itself; DENIES any interpretation by petitioner of the standard other than that pursuant to Wisconsin law; DENIES the remaining allegations of paragraph 14.

15. DENIES that the petitioner is entitled to any of the relief requested.

Grounds for Review and Relief Sought

a) DENIES that the decision is subject to judicial review because the petitioner failed to utilize the exclusive statutory review process found at Wis. Stat. § 283.63, and therefore the court lacks jurisdiction to proceed.

b) DENIES the premise(s) of each and every subsection 1 through 14 of the relief sought by the petitioner.

c) DENIES that the petitioner is entitled to any of the relief requested in subsections 1 through 14.

AFFIRMATIVE DEFENSES

1. The petition should be dismissed for failure to state a claim on which any relief can be granted.

2. The petition should be dismissed because the petitioner failed to utilize the exclusive statutory review process found at Wis. Stat. § 283.63, and therefore the court lacks jurisdiction to proceed.

WHEREFORE, the respondent WDNR requests:

1. That the decision of the WDNR in this matter be wholly affirmed;
2. That the petition be dismissed upon the merits and with prejudice;
3. Its costs and fees in this matter; and

4. Such other relief as the Court deems appropriate.

Dated this 17h day of August 2011.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

A handwritten signature in cursive script, reading "Lorraine C. Stoltzfus".

LORRAINE C. STOLTZFUS
Assistant Attorney General
State Bar #1003676

Attorneys for Respondent Wisconsin
Department of Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9226
(608) 266-2250 (Fax)
stoltzfuslc@doj.state.wi.us

MILESTONES FOR ADDITIONAL ACTIONS ON EPA 75

(5/16/2012)

I. RULE MAKING SCHEDULES:

Rule Package 1 - Sanitary Sewer Overflows (SSOs) & Bypassing

Federal Issue: Issue # 1 (SSOs)

Rulemaking Schedule for RP 1:

- **Rule Draft Completed** – December 2011
- **NRB Authorization for Hearing** – January 2012
- **EIA Process Completed** – May 2012
- **Public Hearings** – August 2012
- **NRB Adoption** – October 2012
- **Submit Rule for Legislative Review** – January 2013
- **Effective** – After completion of Legislative review

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 2 – Pretreatment

Federal Issues: Issue # 16 (Pretreatment)

Rulemaking Schedule for RP 2:

- **Rule Draft Completed and EIA Process Completed** – October 2012
- **NRB Authorization for Hearing** – December 2012
- **Public Hearings** – March 2013
- **NRB Adoption** – May 2013
- **Submit Rule to Legislature** – July 2013
- **Effective Date** – After completion of legislative review process

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 3 – NR 106 Issues and Some Great Lakes Initiative (GLI) Issues

Federal Issues:

- Issue # 8 Mercury Reasonable Potential
- Issue # 10 (Intake Pollutants)
- Issue # 17 Noncontact Cooling Water Exemption Issue # 71
- Mixing Zone Phase out for Bioaccumulative Chemicals of Concern (BCCs)

Rulemaking Schedule for RP 3:

- **Rule Draft Completed and EIA Process Completed** – November 2012
- **NRB Authorization for Hearing** – January 2013
- **Public Hearings** – May 2013
- **NRB Adoption** – September 2013
- **Submit Rule to Legislature** – November 2013
- **Effective Date** – After completion of legislative review process

(Note: The scope statement was published prior to June 8, 2011 so Governor's approval is not required and therefore those actions are not included in the schedule)

Rule Package 4 – Additional NR 106 Issue:

Federal Issues:

- Issue # ~~28~~ (Acute limits = FAV)
- Issue # ~~32~~ Tier II Value Compliance Schedule Provision
- Issues # ~~31~~, ~~35~~, ~~36~~, ~~37~~ and ~~38~~ (Ammonia)
- Issues # ~~2~~, ~~30~~, ~~34~~, ~~41~~ (Expression of Limits)
- Issues # ~~39~~ - ~~43~~ (Chloride)
- Issue # ~~70~~ (Alternative Limit When Results Cannot Be Quantified)
- Issue # ~~10~~ and #~~74~~ Regarding Whole Effluent Toxicity Reasonable Potential (WET R.P.) and Other WET issues and
- Issue # ~~10~~ TMDL Procedures for Discharges in the Great Lakes Basin

Rulemaking Schedule for RP 4:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – December 2013
 - **NRB Authorization for Hearing** – February 2014
 - **Public Hearings** – April 2014
 - **NRB Adoption** – August 2014
 - **Submit Rule to Governor** – September 2014
 - **Written Approval from Governor** – November 2014
 - **Submit Rule to Legislature for review** – January 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 5 – NR 200, NR 205, NR 220 - Technology Based Limit Issues, New Source Performance Standards (NSPS), Expression of Limits Generally, Mass limits, Generic Reasonable Potential, Pollutants in the Intake for Technology Based Limits, BMP limits, General Compliance Schedule provisions, Waters of the

State (note to definition), Permit application requirements for Industrial groups, Intake requirements for new facilities (316(b)):

Federal Issues:

- Issue #2 (122.45 (a) and (h), (b)(1), (c), (d), (f) and (g), (i))
- Issue #7 (NSPS)
- Issue #11 (Generic RP)
- Issue #13 (Best Management Practice (BMP) authority)
- Issue #14 (Antibacksliding)
- Issue #15 (General Compliance Schedule language)
- Issue #20 (Adjustment to Technology Limits)
- Issue #29 (Solid Waste Leachate Provision in Compliance Schedules)
- Issue #46 (Expedited Variance for Technology Based Limits))
- Issue #61 (Application Requirements for Certain Classified Groups)
- Issue 14 (Antibacksliding)

Rulemaking Schedule for RP 5:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – April 2014
 - **NRB Authorization for Hearing** – July 2014
 - **Public Hearings** – October 2014
 - **NRB Adoption** – January 2015
 - **Submit Rule to Governor** – February 2015
 - **Written Approval from Governor** – April 2015
 - **Rule to Legislature for review** – June 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 6 – Permit Processing Issues and other Permit Issuance Procedural Matters

Federal Issues:

- Issue 3 (Process for citizens to request permit modifications)
- Issue 18 (Signatures of Permit Applications)
- Issue 21 and 66 (Fact Sheets)
- Issue 22 (Sending Draft Permits to Agencies)
- Issue 45 (Permits Not a Property Interest, Permit Shield Provisions)
- Issues 47 (Signatory to Permit)
- Issue 48 and 50 (Termination of Permit Procedures)
- Issue 49 (Notification of Permit Changes)
- Issue 51 (Public Info Hearing Procedures Requests)
- Issue 62 (Suspension of Permits)
- Issue 65 (Preparation of Draft Permit Required)

Rulemaking Schedule for RP 6:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – December 2013
 - **NRB Authorization for Hearing** – January 2014
 - **Public Hearings** – March 2014
 - **NRB Adoption** – June 2014
 - **Submit Rule to Governor** – July 2014
 - **Written Approval from Governor** – September 2014
 - **Submit Rule to Legislature for review** – January 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 7 – Analytical Test Methods

Federal Issues: Issue 9 (Analytical Test Methods)

Rulemaking Schedule for RP 7:

- **Scoping Statement to Governor** – May 2012
 - **Approval from Governor to proceed** – May 2012
 - **Scope Statement Submitted to NRB for Approval** – June 2012
 - **Rule Draft Completed and EIA Process Completed** – December 2013
 - **NRB Authorization for Hearing** – February 2014
 - **Public Hearings** – April 2014
 - **NRB Adoption** – June 2014
 - **Submit Rule to Governor** – July 2014
 - **Written Approval from Governor** – September 2014
 - **Submit Rule to Legislature for review** – January 2015
 - **Effective Date** – After completion of legislative review process
-

Rule Package 8 – Storm water Rule Revisions

Federal Issues: Issues # 23, 24, 25, 26, 52, 53, 57 and 67 (see notes below)

Rulemaking Schedule for RP 8:

- **Rule Draft Completed and EIA Process Completed** – December 2013
- **NRB Authorization for Hearing** – January 2014
- **Public Hearings** – August 2014
- **NRB Adoption** – October 2014
- **Submit Rule to Legislature** – January 2015
- **Effective Date** – After completion of legislative review process

Note # 1: The scope statement for RP 8 was published prior to June 8, 2011 so Governor approval is not required and is therefore not included in the schedule. This scope statement included changes to ch. NR 216 for consistency with federal regulations, and will address low priority or minor storm water issues raised in EPA's letter

Note# 2: For issue # 24 regarding construction site storm water permit coverage of commercial building sites and one and two family dwellings, the Department will seek removal of the note in NR 216.42(9) by January 2013 and will no longer deem the DSPS program as equivalent. In addition, DNR will continue to act as permitting authority for commercial building construction sites and will not deem the DSPS program as equivalent under s. NR 216.42(4). In January 2013, the state will seek a legislative change to clarify permitting authority, and in January 2014, submit proposed manual code changes for EPA approval - see II and III below.

II. STATUTORY CHANGES:

Statutory Changes Regarding Storm water– WisDOT permitting exemption

Federal Issue: Issue # 23 & 26 (DOT)

Proposed Schedule:

- **Begin administrative and transitional measures** – March 2012
- **Submit legislative change recommendation**– January 2013

Statutory Change Regarding Storm water – Commercial building regulation

Federal Issue: Issue # 24 (DSPS)

Proposed Schedule:

- **DNR will continue permitting** – Continuously
- **Submit legislative change recommendation**– January 2013

Other Statutory Change Regarding NPDES Program Issues

Federal Issues: Issues # 6, 27, 48 and 50

Statutory changes were already enacted to establish terminology consistent with federal regulations (e.g. "termination, revocation and reissuance and modification"). This addresses part of issues 48 and 50.

Statutory changes will again be requested by January 2013 to address EPA's comments on Issues 6 and 27. As part of this statutory request, the Department may also request additional statutory changes that were already covered by the Attorney General's Statement simply for clarification purposes. The Department may also request that other issues included in the rule making packages above be addressed through statutory changes so they can be resolved more quickly.

III. OTHER ACTIONS:

A. Manual Code Change Recommendation Schedules:

Manual Code Change – Other environmental programs, ss. NR 216.21(4) and NR 216.42(6)

Federal Issue: Issue # 24 Storm water

Proposed Schedule:

- **DNR to develop manual code**– December 2013
- **Seek EPA approval** – January 2014

B. Communication Change Schedules (Completed):

Approval Letter Change 1 – Authorized Local Storm water Programs

Federal Issue: Issue # 25 (ALPs)

Proposed Schedule:

- **Approvals clearly stipulating DNR as permitting authority** – March 2012 and forward

C. Memorandum Of Agreement Addendum:

Some of the issues included in rule making packages may be resolved more quickly through an Addendum to the MOA between EPA and DNR.



3 Issues on AG's Statement

Nyffeler, Robin T - DNR

to:

Barbara Wester

05/17/2012 03:39 PM

Cc:

Stephen Jann

Hide Details

From: "Nyffeler, Robin T - DNR" <Robin.Nyffeler@Wisconsin.gov>

To: Barbara Wester/R5/USEPA/US@EPA,

Cc: Stephen Jann/R5/USEPA/US@EPA

1 Attachment



Stipulation and Order signed by jg.pdf

Hi Barbara,

I'm sorry that I haven't gotten back to you on the 3 issues we discussed regarding the AG's Statement. I have been buried with work. I will try to get information to you in the next two weeks.

Anyway, here is a court ordered Stipulation on the noncontact cooling water exemption in NR 106 that you (and Steve) may be interested in.



Robin T. Nyffeler

Attorney, Bureau of Legal Services

Wisconsin Department of Natural Resources

(☎) phone: (608) 266-0024

(☎) fax: (608) 266-6983

(✉) e-mail: Robin.Nyffeler@wisconsin.gov

CONFIDENTIALITY: This message may contain information which, by law, is privileged, confidential or exempt from disclosure. Contact the sender for permission prior to disclosing the contents of this message to any other person.

This message is intended solely for the use of the addressee. If you are not the addressee, you are hereby notified that any use, distribution or copying of this message is strictly prohibited. If you received this message in error, please notify us by reply e-mail or by telephone and immediately delete this message and any and all of its attachments.

COPY

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 2

DANE COUNTY

MIDWEST ENVIRONMENTAL
DEFENSE CENTER, INC.,

Plaintiff,

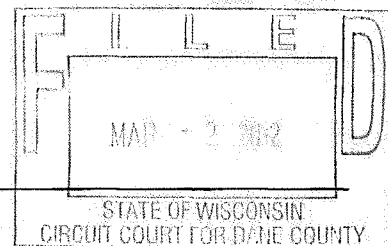
v.

Case No. 12-CV-0569

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,
NATURAL RESOURCES
BOARD, and CATHY STEPP,

Declaratory Judgment: 30701
Admin. Agency Review: 30607

Defendants.



STIPULATION AND ORDER

The plaintiff brought this action challenging the validity and reliance on a portion of Wis. Admin. Code § NR 106.10(1), which contains an exclusion to certain compounds subject to water quality based effluent limitations in WPDES permits. The parties wish to resolve this matter without additional litigation and believe this stipulation to be in the public interest and consistent with the requirements of the Clean Water Act and state laws and regulations implementing the Clean Water Act, and AGREE and STIPULATE as follows:

1. The part of the rule that reads, "but do not include the addition of compounds at a rate and quantity necessary to provide a safe drinking water supply, or the addition of substances in similar type and amount to those substances typically added to a public drinking water supply," does not comply with the requirements of the federal Clean Water Act, 33 U.S.C. §§

1251 to 1387, and regulations adopted under that act and is therefore declared to be invalid, and the Department of Natural Resources shall continue not to rely on that part of the rule.

2. As required by Wis. Stat. § 227.40(6), by copy of this Stipulation and Order, the legislative reference bureau is ordered to publish a notice of the Court's determination as to the invalidity of those portions of Wis. Admin. Code § NR 106.10(1) identified in this Stipulation and Order in the Wisconsin Administrative Register under Wis. Stat. § 35.93(4), and it shall insert an annotation of the Court's determination in the Wisconsin Administrative Code under Wis. Stat. § 13.92(4)(a).

3. The Department of Natural Resources shall grant or deny the four pending Wis. Stat. § 283.63 petitions identified in the complaint by no later than thirty days following the date of the Court's entry of this Order, and if any of the petitions for hearing is granted, shall refer the matter to the Division of Hearings and Appeals within thirty days of the Department's granting of the petition.

4. This action may be dismissed.

Dated: 28 February 2012
J.B. VAN HOLLEN
Attorney General

Joanne F. Kloppenburg
JOANNE F. KLOPPENBURG
Assistant Attorney General
State Bar No. 1012239
Attorneys for Defendant
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227

Dated: 2/27/12
MCGILLIVRAY WESTERBERG
& BENDER LLC

James N. Saul
JAMES N. SAUL
State Bar No. 1067236
DAVID C. BENDER
State Bar No. 1046102
Attorneys for Plaintiff
211 S. Patterson St., Suite 320
Madison, Wisconsin 53703
(608) 310-3560

ORDER

The terms of the foregoing stipulation are approved by and made the order of the Court, and this action is dismissed, this 2nd day of MARCH, 2012. This is a Final Order under Wis. Stat. § 808.03(1).

BY THE COURT:

Maryann Sumi
MARYANN SUMI
Circuit Judge, Branch 2



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Kevin M. St. John
Deputy Attorney General

Steven P. Means
Executive Assistant

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Thomas J. Dawson
Assistant Attorney General
dawsonjt@doj.state.wi.us
608/266-8987
FAX 608/266-2250

July 2, 2012

Attorney Robin Nyffeler
Bureau of Legal Services
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Re: Attorney General's Statement Regarding Authority to Administer NPDES
Permit Program

Dear Ms. Nyffeler:

In your June 19, 2012, email (enclosed) you write:

EPA had a follow-up question on the January 19th AG's Statement that addressed some of the 75 issues with Wisconsin's NPDES permit program. Specifically, EPA had a follow-up question on issue # 64 - public participation in the enforcement process. They asked if you could provide additional information on the following question:

If the state settles an enforcement action with a permittee before (or at the same time) a complaint is filed with the court, is an adversely affected person's right to intervene (or challenge a settlement) subject to a higher burden or standard compared to a adversely affected person's right to intervene in enforcement cases prior to settlement (e.g. where a complaint was filed, but no settlement yet reached)? Put another way, if the state settles an enforcement action with a permittee before (or at the same time) a complaint is filed with the court, is the right to intervene after entry of judgment (which is only granted upon a strong showing of entitlement & of justification for failure to request intervention sooner) equal to the right to intervene under . . . 40 CFR 123.27(d)[.]

I believe the answer to both of the above questions is yes.

As stated in the Attorney General's January 19, 2012, letter to DNR Deputy Secretary Matt Moroney on Issue #64 at 13:

40 CFR § 123.27(d) requires any state administering the NPDES program to "provide for public participation in the State enforcement process by providing either:" (1) an ability for adversely affected citizens to intervene, as a matter of right, "in any civil or administrative action to obtain remedies" for violations of the State NPDES program, or (2) by providing a system in which the Department or the DOJ will "provide written responses to all citizen complaints," "[n]ot oppose intervention by any citizen" when authorized by law, and "[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action."

The State does not provide for administrative enforcement actions under Wis. Stat. ch. 283. All enforcement actions are civil or criminal in nature. The State provides for public participation under option (1) above by allowing adversely affected citizens to intervene in any civil enforcement action. Wisconsin Stat. § 803.09(1) provides a right of intervention by anyone in an action if they meet the following requirements: "(1) that the motion to intervene be made in a timely fashion; (2) that the movant claims an interest relating to the property or transaction which is the subject of the action; (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest is not adequately represented by existing parties." *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994).

See also, State ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 549, 334 N.W.2d 252 (1983).

I assume EPA's questions are prompted by the Attorney General's January 19, 2012, letter to DNR Deputy Secretary Matt Moroney on Issue #64 at 13, which states in part:

The Wisconsin Court of Appeals stated that "[t]he general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." *Sewerage Commission of the City of Milwaukee v. Department of Natural Resources*, 104 Wis. 2d 182, 188, 311 N.W.2d 677 (Ct. App. 1981), quoting *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir.), cert. denied, *National Farmers' Organization, Inc. v. U.S.*, 429 U.S. 940 (1976). "[P]ost judgment intervention may be allowed where it is the only way to protect the movant's rights." *Sewerage Commission*, 104 Wis. 2d at 188.

At the outset, we suggest the question posed is not germane to determining whether Wisconsin state law is consistent with the federal requirement. As stated, 40 CFR § 123.27(d)

requires any state administering the NPDES program to "provide for public participation in the State enforcement process by providing" an ability for adversely affected citizens to intervene, as a matter of right, "in any civil or administrative action to obtain remedies" for violations of the State NPDES program. On its face, Wis. Stat. § 803.09(1) provides such a right and meets this requirement.

The fact that reasonable statutory requirements must be met in order to invoke the right of intervention is not fatal to the consistency requirement. Again, those requirements for intervention as of right are: "(1) that the motion to intervene be made in a timely fashion; (2) that the movant claims an interest relating to the property or transaction which is the subject of the action; (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the movant's interest is not adequately represented by existing parties." *Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 471, 516 N.W.2d 357 (1994).

In *Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156 (D.C. Cir. 1988), plaintiffs claimed "that 33 U.S.C. § 1251(e) requires states to provide for citizen suits and intervention rights just as the CWA does at the federal level." *Id.* at 173. In that case plaintiff challenged the rule at issue in your inquiry [40 C.F.R. § 123.27(d)] on the basis that it did not afford the same intervention rights as under federal law. The court upheld the rule observing that "in promulgating the regulations and again in its brief before this court, the agency indicated that the first option-provision of intervention as of right-called for state intervention rights *similar to* those accorded by the federal rules." *Id.* at 177 (emphasis added). The court "conclude[d] that the regulations, as interpreted, provide meaningful and adequate opportunity for public participation consistent with the statutory mandate. The regulations reasonably accommodate conflicting statutory prescriptions by 'establish[ing] requirements which ensure the benefits of public participation, while intruding less into the States' management of their judicial and administrative systems.'" *Id.* at 178, citing Consolidated Permit Regulations, 45 Fed.Reg. 33,290, 33,382 (footnotes omitted). To impose a more liberal intervention requirement would intrude more, not less, into the States' management of their judicial and administrative systems. Cf., *Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d at 178.

Applying these principles, the court in *Paper, Allied-Industrial, Chemical And Energy Workers Intern. Union v. Continental Carbon Co.*, 428 F.3d 1285, 1296-1297 (10th Cir. 2005), held that the Arkansas intervention statute that was more restrictive than the federal rule complies with the applicable federal requirement for public participation in enforcement proceedings. There the court held, "Oklahoma's public-participation provisions are *comparable enough* to permit a delegation of CWA enforcement authority" *Id.* at 1297 (emphasis added).

Thus, even if the Wisconsin intervention rule were viewed as more restrictive than the federal intervention rule, it would not be so divergent as to call into question its consistency with the federal Clean Water Act public participation requirement.

As for the question posed, even though the courts allow for an EPA or state rule to diverge from federal intervention standards, not even this issue is presented here. This is because Wis. Stat. § 803.09(1) is based on Fed. R. Civ. P. 24(a)(2) and the courts look to cases and commentary relating to Rule 24(a)(2) for guidance in interpreting § 803.09(1). *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d at 547; *see also State v. Evans*, 2000 WI App 178, ¶ 8 n. 2, 238 Wis. 2d 411, 617 N.W.2d 220 ("[W]here a state rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority.").

As was made clear in our January 19, 2012 letter, the quotation at issue in *Sewerage Commission of the City of Milwaukee v. Department of Natural Resources*, 104 Wis. 2d 182, 188, 311 N.W.2d 677 (Ct. App. 1981), is based on the federal intervention rule and federal case law interpreting the rule. Thus, Wisconsin intervention law is not more restrictive than federal intervention law.

A review of Wisconsin case law reveals that an adversely affected person's right to intervene (to challenge a settlement) is subject to no higher burden or standard than compared to an adversely affected person's right to intervene in enforcement cases under federal law, and the right to intervene prior to or after settlement turns on all the circumstances, with timeliness being just one factor in context with many others, some of which carry more weight than timeliness alone.

For example, in *C.L. v. Edson*, 140 Wis. 2d 168, 178-179, 409 N.W.2d 417 (Ct. App. 1987) intervention was held to be timely and the burden was met even though intervention was requested nine months after judgment where a party requested access to documents four months after judgment and brought a mandamus action before moving to intervene. Significant in meeting the *Sewerage Commission* test (cited at 140 Wis. 2d at 178), were several factors bearing on timeliness *under the circumstances*. First, the court observed, "the newspaper could not have known its interests in disclosure until it discovered the judgment approving settlements that called for secrecy." *C.L. v. Edson*, 140 Wis. 2d at 178. Second, the court found "this is not a case where the newspaper delayed for nine months after it knew of the judgment. The newspaper's attempts to view the documents began a reasonable time after it knew the judgment had been entered." *Id.* at 178-179. Thus, "We conclude that, under the unique facts of this case, the newspaper's intervention was prompt." *Id.* at 179. Also bearing on the timeliness issue the court observed, "From the context of the hearing, it is clear that the court's reference to 'previous matters' included a finding that the intervention would not affect the terms of the settlement between the parties. Moreover, the parties have not shown any prejudice resulting from having to defend a postjudgment intervention nine months after judgment." *Id.* at 179.

In *First Wisconsin National Bank v. Jagers*, No. 88-0077, unpublished slip op. ¶ 2 (WI App. Dec. 21, 1988), 1988 WL 148302, the court distinguished the *Sewerage Commission* case by observing:

In denying intervention, the trial court also relied on the standard adopted in *Milwaukee Sewerage Comm'n v. DNR*, 104 Wis. 2d 182, 311 N.W. 2d 677 (Ct. App. 1981), that intervention motions after entry of final judgment will be granted "only upon a strong showing of entitlement and of justification for failure to request intervention sooner." *Id.* at 188, 311 N.W.2d at 680. This test is inapplicable to the circumstances here, where there was no reason for intervention prior to ITT's motion to set aside the judgment, the intervention was sought to validate the judgment, not to overturn it, and the motion to intervene was brought one month prior to the scheduled hearing on the motion to set aside the foreclosure judgment. This is not a case where the proposed intervenors knew about the action affecting their interests but failed to act until after the action was resolved. *See id.* at 186, 311 N.W.2d at 679. Even applying the *Milwaukee Sewerage* test to the circumstances here can result in only one reasonable conclusion: there was a strong showing of entitlement and justification. Intervention is the "only way to protect the movant's rights." *Id.* at 188, 311 N.W.2d at 680.

In *Olivarez v. Unitrin Property & Cas. Ins. Co.*, 2006 WI App 189, 296 Wis. 2d 337, 723 N.W.2d 131, after citing to the applicable case law, including the *Sewerage Commission* case, the court affirmed the denial of intervention by applying the applicable law as follows. "We take no issue with these cases in general, inasmuch as they illustrate that timeliness turns on whether, *under all the circumstances*, a proposed intervenor acted promptly and whether intervention will prejudice the original parties." 296 Wis. 2d 337, ¶ 20 (emphasis added). The court recognized that while some case holdings supported late-stage intervention, *id.* at ¶ 23, the facts of this particular case, as in *Sewerage Commission*, favored denial of intervention as untimely. 296 Wis. 2d 337, ¶ 24. Tellingly, the court found that prejudice would have been occasioned on the other parties by late intervention.

The bottom line of the cases in Wisconsin is that timeliness alone was not determining, and that the requirement for "a strong showing of entitlement and of justification for failure to request intervention sooner," *Sewerage Commission*, 104 Wis. 2d at 188, is not only consistent with federal intervention case law, but is a showing that can be met if the movant makes the requisite showing that the motion seeking intervention is timely under the circumstances, including under those that go to whether his or her rights will be adversely affected, and whether intervention will or will not prejudice the rights of the parties. Any suggestion that 40 C.F.R. §

Attorney Robin Nyffeler
July 2, 2012
Page 6

123.27(d) permits an intervention that is untimely because it would prejudice the parties is inconsistent with the law and common sense.

For the above reasons, the Wisconsin intervention rule is consistent with the federal Clean Water Act public participation rule.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Dawson", with a large, loopy flourish extending from the end of the signature.

Thomas J. Dawson
Assistant Attorney General
Environmental Protection Unit Director

TJD:drm

Enclosure

Dawson, Thomas J.

From: Nyffeler, Robin T - DNR [Robin.Nyffeler@Wisconsin.gov]
Sent: Tuesday, June 19, 2012 3:53 PM
To: Dawson, Thomas J.
Cc: Barbara Wester
Subject: January 19th 2012 AG's Statement


Hi Tom,

EPA had a follow-up question on the January 19th AG's Statement that addressed some of the 75 issues with Wisconsin's NPDES permit program. Specifically, EPA had a follow-up question on issue # 64 - public participation in the enforcement process. They asked if you could provide additional information on the following question:

If the state settles an enforcement action with a permittee before (or at the same time) a complaint is filed with the court, is an adversely affected person's right to intervene (or challenge a settlement) subject to a higher burden or standard compared to a adversely affected person's right to intervene in enforcement cases prior to settlement (e.g. where a complaint was filed, but no settlement yet reached)? Put another way, if the state settles an enforcement action with a permittee before (or at the same time) a complaint is filed with the court, is the right to intervene after entry of judgment (which is only granted upon a strong showing of entitlement & of justification for failure to request intervention sooner) equal to the right to intervene under 40 CFR 40 CFR 123.27(d)

I think an e-mail response should be sufficient. Thank you.

Robin Note to Barbara: If I did not correctly state the issue, please provide clarification.

 Robin T. Nyffeler
Attorney, Bureau of Legal Services
Wisconsin Department of Natural Resources
(☎) phone: (608) 266-0024
(☎) fax: (608) 266-6983
(✉) e-mail: Robin.Nyffeler@wisconsin.gov

CONFIDENTIALITY: This message may contain information which, by law, is privileged, confidential or exempt from disclosure. Contact the sender for permission prior to disclosing the contents of this message to any other person.

This message is intended solely for the use of the addressee. If you are not the addressee, you are hereby notified that any use, distribution or copying of this message is strictly prohibited. If you received this message in error, please notify us by reply e-mail or by telephone and immediately delete this message and any and all of its attachments.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 05 2012

REPLY TO THE ATTENTION OF:
WN-16J

Kenneth G. Johnson, Administrator
Division of Water
Wisconsin Department of Natural Resources
Post Office Box 7921
Madison, Wisconsin 53707-7921

Dear Mr. Johnson:

I am writing to provide a summary of the efforts to resolve issues initially identified in the U.S. Environmental Protection Agency's letter to Secretary Stepp of July 18, 2011. Ms. Stepp's October 17, 2011 reply letter committed the State to resolving the issues through four parallel processes, including rulemaking, statutory amendments, clarification of Wisconsin's Attorney General's statement supporting the State's approved National Pollutant Discharge Elimination System Permit (NPDES) program, and potential amendments to the Wisconsin-EPA memorandum of agreement (MOA) for the NPDES program. In the past several months, EPA and the Wisconsin Department of Natural Resources (WDNR) have made significant progress toward bringing the issues to closure. A description of each issue identified in EPA's 2011 letter and the manner in which EPA and WDNR have agreed to resolve these issues is found in Enclosure 1.

Rulemaking and Statutory Changes

EPA requested that the WDNR establish a schedule to complete regulatory and statutory changes by October 2012 and October 2013, respectively. In Secretary Stepp's May 18, 2012 letter to EPA, WDNR provided the estimated timeframe for eight proposed rulemaking packages and explained that, while it would not be possible to meet EPA's dates under the State's rulemaking process, WDNR is committed to moving these rulemaking packages as quickly as possible. EPA understands that the eight rule packages need to go through each step in the State's rulemaking process.

Attorney General Statement

During the last several months, WDNR, EPA, and the Wisconsin Department of Justice have exchanged information on each issue identified for further clarification in WDNR's October 14, 2011 letter to Attorney General Van Hollen. A review of the information, including that provided in the Attorney General's January 19, 2012 reply letter to WDNR, leads EPA to conclude that issues 5, 7, 10, 12, 19, 44, 51, 58, 59, 63, 64, and 75 in EPA's 2011 letter are resolved. Resolution notwithstanding, EPA appreciates and supports the commitment WDNR

made in its May 2012 letter to amend rules pertaining to issues 7, 10, and 51. All of the issues assigned for resolution by the Attorney General's office are further described in Enclosure 2.

Amending the Wisconsin-EPA NPDES MOA

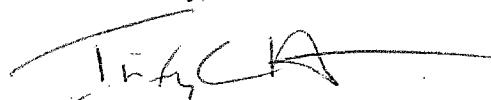
Attachment A to Secretary Stepp's letter of October 14, 2011 included a list of issues proposed for resolution through an amendment of the Wisconsin-EPA NPDES MOA. Following subsequent discussions between our respective staffs, EPA agrees that issues 18, 21, 22, 38, 39, and 66 are amendable to resolution through an addendum to this MOA. These issues are noted in Enclosure 1. We anticipate providing a draft MOA Addendum to WDNR for review in the near future.

Additional Issues

As noted in Enclosure 1, EPA now considers issues 54, 68, and 72 closed. EPA understands that Wisconsin will revise the rule that gives rise to issue 55. EPA erroneously omitted a comment on Wis. Admin. Code NR § 216.21(4) in our July 2011 letter. Resolution for this issue, as well as issues 24, 25, and 69, await further discussion between EPA and WDNR.

We appreciate the dedicated efforts of WDNR to cooperate with EPA to accomplish the work described in this letter and to resolve the remaining issues.

Sincerely,


for Tinka G. Hyde
Director, Water Division

Enclosures

Enclosure 1

Overview of Issues to be resolved through rulemaking, statutory amendment, an MOA Addendum, or Attorney General clarifications relating to the State's Approved NPDES Program

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|--|---|---|-----------------------------------|---|-----------------------------|
| 1 | #1 | | | | |
| 2 | #4, 5 | | | | |
| 3 | #6 | | | | |
| 4 | #5 | | | | |
| 5 | | | | yes | |
| 6 | | Yes - Other statutory NPDES program changes | | | |
| 7 | #5 | | | yes | |

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|--|---|------------------------------------|-----------------------------------|---|-----------------------------|
| 8 | #3 | | | | |
| 9 | #7 | | | | |
| 10 | #3, #4 | | | yes | |
| 11 | #5 | | | | |
| 12 | | | | yes | |
| 13 | #5 | | | | |
| 14 | #5 | | | | |
| 15 | #5 | | | | |
| 16 | #2 | | | | |

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|---|--|---|----------------------------|--|----------------------|
| 17 | #3 | | | | |
| 18 | #6 | | | | yes |
| 19 | | | | yes | |
| 20 | #5 | | | | |
| 21 | #6 | | | | yes |
| 22 | | | | | yes |
| 23 | #8 | Yes - Statutory changes relating to storm water | | | |
| 24 | #8 ¹ | Yes - Statutory changes relating to storm water | | | |
| 25 | #8 ² | | | | |

¹ Wisconsin proposed a "manual code change" to resolve the issue with Wis. Admin. Code NR § 216.42(6). This proposal requires further discussion.

² Wisconsin proposed a "manual code change" to resolve the issue with Wis. Admin. Code NR § 216.415(4). This proposal requires further discussion.

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|---|--|---|---|--|----------------------|
| 26 | #8 | Yes - Statutory changes relating to storm water | | | |
| 27 | | Yes - Other statutory NPDES program changes | | | |
| 28 | #4 | | | | |
| 29 | #5 | | | | |
| 30 | #4 | | | | |
| 31 | #4 | | | | |
| 32 | #4 | | | | |
| 33 | | | Resolved by Attachment C – letter of 10/17/2011 | | |
| 34 | #4 | | | | |

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|---|--|-----------------------------|----------------------------|--|----------------------|
| 35 | #4 | | | | |
| 36 | #4 | | | | |
| 37 | #4 | | | | |
| 38 | #4 | | | | yes |
| 39 | #4 | | | | yes |
| 40 | #4 | | | | |
| 41 | #4 | | | | |
| 42 | #4 | | | | |
| 43 | #4 | | | | |
| 44 | | | | yes | |
| 45 | #6 | | | | |
| 46 | #5 | | | | |

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|---|--|---|----------------------------|--|----------------------|
| 47 | #6 | | | | |
| 48 | #6 | Yes - Other statutory NPDES program changes | | | |
| 49 | #6 | | | | |
| 50 | #6 | Yes - WDNR reported that the State has enacted an amendment to address this issue, in part. | | | |
| 51 | #6 | | | yes | |
| 52 | #8 | | | | |
| 53 | #8 | | | | |
| 54 | Resolved via review of s. NR 216.002(2) and recognition | | | | |

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|---|---|-----------------------------|--|--|----------------------|
| | by EPA that the quarter mile separation provided in s. NR 216.42(11) mirrors Part III of the fact sheet for EPA's 2003 construction general permit. | | | | |
| 55 | EPA understands that Wisconsin will revise the rule that gives rise to this issue. | | | | |
| 56 | | | Wisconsin will revise the required content of annual | | |

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|---|--|-----------------------------|--|--|----------------------|
| | | | reports | | |
| 57 | #8 | | Wisconsin will revise the required content of annual reports | | |
| 58 | | | | yes | |
| 59 | | | | yes | |
| 60 | | | | yes | |
| 61 | #5 | | | | |
| 62 | #6 | | | | |
| 63 | | | | yes | |
| 64 | | | | yes | |
| 65 | #6 | | | | |
| 66 | #6 | | | | yes |

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|--|---|------------------------------------|--|---|-----------------------------|
| 67 | #8 | | | | |
| 68 | EPA's re-evaluation of the issue indicates that the issue is closed. | | | | |
| 69 | Awaiting further discussion | | | | |
| 70 | #4 | | | | |
| 71 | #3 | | | | |
| 72 | | | Resolved by Attachment C – letter of 10/17/2011. | | |

| Issue as identified in EPA's July 18, 2011 letter to WDNR | Rulemaking Package Assigned (Based on Milestones identified in letter of May 18, 2012) | Statutory Changes Projected | Other Resolution Mechanism | Clarified through Attorney General Statement | MOA Change Projected |
|--|---|------------------------------------|--|---|-----------------------------|
| 73 | | | Resolved by Attachment C to WDNR's letter of 10/17/2011. | | |
| 74 | #4 | | | | |
| 75 | | | | yes | |